Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY, AND PREMIER ELKHORN COAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
RICHARD T. MORRISON
Acting Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
DEANNE E. MAYNARD
Assistant to the Solicitor General
KENNETH L. GREENE
STEVEN W. PARKS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a taxpayer who would have been entitled to file a tax refund action in federal court to seek a refund of taxes (and interest thereon), but who failed to satisfy a statutory prerequisite to such an action (namely, the filing of a timely administrative refund claim) and is therefore barred from bringing such an action, may obtain a refund, and interest thereon, through an action directly under the Constitution pursuant to the Tucker Act, 28 U.S.C. 1491(a).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 473 F.3d 1373. The opinion of the Court of Federal Claims (App., *infra*, 11a-28a) is reported at 54 Fed. Cl. 563, and a subsequent order (App., *infra*, 10a) and the judgment (App., *infra*, 7a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2007. A petition for rehearing was denied

on April 27, 2007 (App., *infra*, 29a-30a). On July 17, 2007, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including September 9, 2007 (Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in an appendix to the petition. App., *infra*, 43a-47a.

STATEMENT

1. In 2000, the Internal Revenue Service (IRS) acquiesced in a holding by a federal district court that an excise tax on coal (26 U.S.C. 4121(a)) violated the Export Clause of the Constitution, Art. I, § 9, Cl. 5, as applied to sales of coal that were in the stream of export and subsequently exported. See App., *infra*, 2a. In its acquiescence, the IRS stated that the tax would not be imposed on exported coal, and that the IRS would refund any tax paid on exported coal if the taxpayer filed a timely administrative claim for refund of the tax. See I.R.S. Notice 2000-28, 2000-1 C.B. 1116; App., *infra*, 12a.

Section 7422(a) of the Internal Revenue Code provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected" unless the taxpayer has "duly filed" with the IRS an administrative claim for a tax refund. 26 U.S.C. 7422(a). Section 6511(a) provides that an administrative "[c]laim for credit or refund of an overpayment of any tax imposed by this [Title 26] * * * shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid,"

whichever is later. 26 U.S.C. 6511(a). Section 6511(b)(1) further provides that "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b)(1). Section 6532(a), in turn, mandates that "[n]o suit or proceeding under section 7422(a) for the recovery of any internal revenue tax * * * shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time," but any refund suit must be begun within two years after the date of the IRS's disallowance of the refund claim, although that period can be extended by agreement. 26 U.S.C. 6532(a)(1) and (2).

In addition, 28 U.S.C. 2411 provides in pertinent part that, "[i]n any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment." It further establishes that interest shall run "from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue." *Ibid.*

In *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001), the Federal Circuit held that a taxpayer may maintain a suit for money damages directly under the Export Clause (invoking jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)) as an "alternative avenue[ ]" to "a tax refund action," and that such an "alternate" action is "not sub-

ject to compliance with the tax refund statute." *Cyprus Amax*, 205 F.3d at 1373-1376; see U.S. Const. Art. I, § 9, Cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."). The court reasoned that the "necessary implication of the Export Clause's unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted." 205 F.3d at 1373. It thus held that the Export Clause is "self-executing; that is, * * * a party can recover for payment of taxes under the Export Clause independent of the tax refund statute." *Id.* at 1374. The court further concluded that such a suit was subject to the general six-year limitation period of 28 U.S.C. 2501 for suits under the Tucker Act, rather than the shorter statute of limitations prescribed by 26 U.S.C. 6511(a) for filing a timely administrative "[c]laim for * * * refund of an overpayment of any tax" as a prerequisite to suit. *Cyprus Amax*, 205 F.3d at 1372-1373.

2. Respondents filed timely administrative claims for refund of tax paid on exported coal for tax years 1997, 1998, and 1999, and the IRS refunded those taxes, including interest. Respondents failed, however, to file timely administrative refund claims for $1,065,936 in coal tax on exports for tax years 1994, 1995, and 1996. Consequently, the IRS did not refund those taxes. App., *infra*, 3a, 9a; Gov't C.A. Br. 3 & n.3. Respondents filed this suit in the Court of Federal Claims seeking "damages consisting of a refund" of the excise tax not refunded, and "appropriate interest, costs, and attorney's fees." App., *infra*, 37a-38a.

The Court of Federal Claims, relying on *Cyprus Amax*, allowed respondents to pursue their monetary claims directly under the Export Clause and to avail themselves of the general six-year statute of limitations

in the Tucker Act, 28 U.S.C. 2501, notwithstanding their failure to file timely administrative refund claims. App., *infra*, 14a. The court, however, denied respondents' request for interest on their claims. *Id.* at 14a-28a. It concluded that respondents could not recover interest under 28 U.S.C. 2411 because their claims were ones "for damage under the Export Clause rather than * * * tax refunds pursuant to the Tax Code." App., *infra*, 17a. The court rejected respondents' argument that they could "avoid the shorter statute of limitations, and the administrative requirements of the tax refund statutes by using the Export Clause for jurisdiction, while returning to the tax statutes to obtain interest pursuant to § 2411." *Ibid.*[1]

In a subsequent order, the court denied the government's request to dismiss respondents' claims with respect to tax periods as to which respondents failed to file timely administrative refund claims or, in the alternative, to limit respondents' recovery to those claims falling within the three-year limitation period of Section 6511(a). App., *infra*, 10a; see *id.* at 41a-42a. The court entered judgment for respondents in the stipulated amount of $1,065,936, without interest. *Id.* at 7a.

3. On cross-appeals, the court of appeals affirmed in part and reversed in part. App., *infra*, 1a-6a. Rejecting the government's request for an initial hearing en banc, the court expressly declined to reconsider its decision in *Cyprus Amax*, *id.* at 2a-3a, holding that respondents "could either proceed in court under the Tucker Act, or seek an administrative tax refund under the Tax Code." *Id.* at 3a. The court observed that "[a] consequence of

[1] The court also rejected respondents' arguments that the Export Clause and other constitutional provisions mandated the payment of interest. App., *infra*, 19a-27a.

Tucker Act jurisdiction is that the statute of limitations is six years, 28 U.S.C. § 2501, whereas refund claims brought administratively to the Internal Revenue Service are limited to recovery of overpayments for the preceding three years." *Ibid.* (citing 26 U.S.C. 6511(a)). The court therefore held that, in addition to the tax years 1997 through 1999 for which respondents had filed administrative claims, they could also seek recovery for the tax years 1994 through 1996 under the longer six-year statute of limitations. *Ibid.*

The court of appeals further held that Section 2411 entitled respondents to recover interest on their claims for the earliest three tax years, 1994 through 1996, notwithstanding their failure to file timely administrative claims for those years. App., *infra*, 3a-6a.[2] The court reasoned that Section 2411 "is a straightforward recognition that the government should pay for its use of a taxpayer's money to which the government was not entitled." *Id.* at 5a. And the court concluded that, regardless of whether respondents filed an administrative claim, the judgment awarded to them was "for" an "overpayment" of tax within the meaning of Section 2411, and that they therefore were entitled to interest "on the refunded export taxes for the entire period of recovery." *Id.* at 6a.

4. The government filed a petition for rehearing en banc, arguing *inter alia* that the decision of the court of appeals was inconsistent with *Hinck* v. *United States*, 446 F.3d 1307 (Fed. Cir. 2006), aff'd, 127 S. Ct. 2011 (2007), and *EC Term of Years Trust* v. *United States*, 434 F.3d 807 (5th Cir. 2006), aff'd, 127 S. Ct. 1763 (2007),

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[2] The court noted that the government did not dispute entitlement to interest for the years 1997 through 1999 "because an administrative claim was filed for those years." App., *infra*, 4a.

both of which were then pending before this Court. On April 27, 2007, the court of appeals denied the petition for rehearing en banc. App., *infra*, 29a-30a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is incorrect, and conflicts with the "well-established principle that, in most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies.'" *Hinck* v. *United States*, 127 S. Ct. 2011, 2015 (2007) (quoting *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007)). The court of appeals erred in permitting respondents to recover tax overpayments through resort to an action directly under the Export Clause and thereby to evade the detailed and carefully reticulated tax refund scheme created by Congress, including its mandatory administrative claims process and its shorter and more specific statute of limitations. The court compounded that error by allowing respondents to benefit from one portion of the comprehensive tax-refund remedy—namely, the allowance of interest—despite their failure to comply with the statutory prerequisites to relief under that remedial scheme.

The question presented is an important one. Given the nationwide jurisdiction of the Court of Federal Claims, any taxpayer in respondent's situation (and potentially any taxpayer with a constitutionally-based claim) can simply re-label its tax refund claims as constitutional claims subject to the Tucker Act, 28 U.S.C. 1491, and thereby evade the limitations imposed by Congress on the scope of the government's waiver of sovereign immunity in the tax context. Moreover, there are more than 25 similar cases currently pending that, under the decision below, expose the United States to sub-

stantial liability for refunds and associated interest despite the taxpayers' failure to comply with those statutory prerequisites.

The court of appeals reached its decision without the benefit of this Court's decisions in *EC Term of Years* and *Hinck*, both of which held that Congress's provision of a specifically tailored remedy under the Internal Revenue Code precludes resort to a more general (and more generous) remedy. Indeed, in both cases the Court rejected attempts by taxpayers to utilize the Tucker Act's grant of jurisdiction as a basis for evading the limitations imposed by Congress on a specific and directly applicable remedial scheme. In this case, by contrast, the court of appeals erroneously authorized just such an evasion. It would therefore be appropriate for this Court to vacate the judgment of the court of appeals and remand for reconsideration in light of those decisions. In the alternative, the petition should be granted and the case set for briefing and oral argument.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS, INCLUDING THE INTERVENING DECISIONS IN *EC TERM OF YEARS* AND *HINCK*

A. This Court Recently Reaffirmed And Applied In The Tax Context The Principle That A Precisely Drawn, Detailed Remedy Precludes Resort To A More General Remedy

Subsequent to the court of appeals' denial of en-banc review in this case, this Court held in *EC Term of Years* that a party could not evade the specific restrictions, including a shorter limitations period, of a tax remedial scheme that was "better-fitted" to its claims by resorting to the more generous terms of the Tucker Act, 28 U.S.C. 1346(a)(1). 127 S. Ct. at 1767. In that case, a trust sought to challenge a government levy on its prop-

erty that was designed to collect the taxes owed by a taxpayer other than the trust. *Id.* at 1766. Having failed to bring a timely action under 26 U.S.C. 7426—which provides for wrongful-levy actions by third parties in the trust's situation—the trust instead brought a tax refund suit in federal district court, relying on the Tucker Act's general tax refund jurisdiction, 28 U.S.C. 1346(a)(1), and the relatively longer limitation period for tax refund suits. *EC Term of Years*, 127 S. Ct. at 1766-1767 & n.2.

This Court rejected that attempt, holding that "a precisely drawn, detailed statute pre-empts more general remedies," and that the preemption principle is further "brace[d] * * * when resort to a general remedy would effectively extend the limitations period for the specific one." *EC Term of Years*, 127 S. Ct. at 1767 (quoting *Brown* v. *GSA*, 425 U.S. 820, 834 (1976)). The Court reasoned that "if third parties could avail themselves of the general tax refund jurisdiction of § 1346(a)(1), they could effortlessly evade the levy statute's 9-month limitations period." *Id.* at 1767-1768.

Similarly, the Court held in *Hinck* that 26 U.S.C. 6404(h) (Supp. IV 2004), which permits a taxpayer to challenge in the Tax Court the IRS's refusal to abate interest on unpaid tax liabilities, provides the exclusive means by which a taxpayer can bring such a challenge. 127 S. Ct. at 2014-2018. In so holding, the Court rejected the taxpayers' argument that they could also seek review of abatement-of-interest determinations "under statutes granting jurisdiction to the district courts and the Court of Federal Claims to review tax refund actions." *Id.* at 2016 (citing 28 U.S.C. 1346(a)(1), 1491(a)(1); 26 U.S.C. 7422(a)). Rather, the Court concluded, the "precisely drawn, detailed statute" of Sec-

tion 6404(h), including its provision of the Tax Court as "the forum for adjudication," preempted resort to the more general jurisdictional provisions of the Tucker Act. *Id.* at 2015. In so holding, the Court rejected the taxpayers' attempt to rely on one portion of the remedy afforded by Section 6404(h), namely "the portion specifying a standard of review," while "circumvent[ing] the other limiting feature Congress placed in the *same* statute—restrictions such as a shorter statute of limitations than general refund suits * * * or a net-worth ceiling for plaintiffs eligible to bring suit." *Ibid.*

B. The Judgment Of The Court Of Appeals Is Irreconcilable With *EC Term Of Years* And *Hinck*

The reasoning of *EC Term of Years* and *Hinck* applies with equal force here, and is irreconcilable with the decision below. Congress has established a careful and thorough remedial scheme to resolve the very type of claim asserted by respondents: the tax refund mechanism, which comprehensively provides for the refund of any internal revenue taxes alleged to have been illegally or erroneously assessed or collected. See App., *infra*, 37a-38a (complaint seeking "damages consisting of a refund"). That comprehensive scheme preempts resort to more general remedies, particularly those that are subject to a more generous statute of limitations, and it precludes respondents from relying on only one portion of that comprehensive scheme (the allowance of interest) while evading others.

1. Under the specific statutory scheme for tax refund claims, an administrative claim for a refund "of *any* tax imposed by * * * [Title 26]" (including the tax at issue here, 26 U.S.C. 4121(a)) "*shall* be filed by the taxpayer within 3 years from the time the return was filed

or 2 years from the time the tax was paid." 26 U.S.C. 6511(a) (emphases added). The statute further provides that "[*n*]*o* * * * *refund shall be allowed* * * * unless a claim for * * * refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b) (emphasis added). This Court has noted the "unusually emphatic form" and "highly detailed technical matter" in which Section 6511 "sets forth its time limitations." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (refusing to apply equitable tolling to those limitations).

In addition, Section 7422(a) mandates that "[*n*]*o suit* or proceeding shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with" the IRS. 26 U.S.C. 7422(a) (emphases added). Once the requisite administrative claim has been filed, "[n]o suit or proceeding" for refund of the tax may be instituted until the claim has been disallowed, or for six months if a ruling on the claim is not forthcoming. 26 U.S.C. 6532(a)(1). Any tax refund action generally must be filed within two years after the date of the IRS's disallowance of the refund claim (although that period can be extended by agreement). 26 U.S.C. 6532(a)(1) and (2).

In the Tucker Act, Congress granted concurrent jurisdiction to the Court of Federal Claims and the federal district courts to hear tax refund claims. 28 U.S.C. 1346(a)(1), 1491(a).[3] Congress further provided that "in-

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[3] Section 1346(a)(1) provides district courts with original jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." Section 1491(a) provides the Court of Federal Claims with jurisdiction over "any claim against the United States

terest shall be allowed," in the event of "any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax," at a rate established by 26 U.S.C. 6621 "from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days." 28 U.S.C. 2411.

Those provisions are all components of a carefully integrated remedial scheme. Accordingly, while Congress conferred jurisdiction to hear tax refund claims in "spacious terms," this Court has made clear that those jurisdictional grants "must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit upon compliance with certain conditions." *United States* v. *Dalm*, 494 U.S. 596, 601-602 (1990) (holding that the restrictions in Section 7422(a) and Section 6511(a) applied to a taxpayer's attempt to resort to Section 1346(a)(1)'s jurisdictional grant); see, *e.g.*, *Commissioner* v. *Lundy*, 516 U.S. 235, 240 (1996) (noting in dicta that "timely filing of a refund claim" pursuant to 26 U.S.C. 7422(a) is "a jurisdictional prerequisite" to bringing a refund suit in either the Court of Federal Claims or a federal district court); *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272-273 (1931) (holding that failure to file an administrative refund claim barred a tax refund suit in the Court of Claims); *Baltimore & Ohio R.R.* v. *United States*, 260 U.S. 565 (1923) (same); *United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488, 491-495 (1906) (sustaining the government's demurrer, in a tax refund suit

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founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." See generally *Flora* v. *United States*, 362 U.S. 145, 151-152 (1960) (discussing historical development of Tucker Act jurisdiction in tax context).

alleging a conceded violation of the Export Clause, because the taxpayer failed to comply with the then-existing requirement that the challenged taxes be paid under protest).

The comprehensive remedial scheme for tax refund claims allows taxpayers an opportunity to challenge taxes that they contend have been erroneously or illegally collected, while ensuring the orderly administration and adjudication of such claims. Section 7422(a)'s claim-filing requirements serve both (1) to give the IRS notice of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination; and (2) to provide the IRS with an opportunity to correct any conceded errors, and if disagreement remains, to limit the scope of any ensuing litigation to those issues that the IRS has examined and is willing to defend. See, *e.g.*, *Felt & Tarrant Mfg. Co.*, 283 U.S. at 272. The prescribed time limits, see 26 U.S.C. 6511(a), 6532(a)(1), also ensure that claims are made promptly, and that the IRS has adequate time to review a claim before a suit is filed. Compare 26 U.S.C. 6532(a)(1) (allowing the IRS six months to review an administrative refund claim before suit can be filed) with Fed. R. Civ. P. 12(a)(3)(A) (allowing the United States 60 days to answer a judicial complaint).

2. Accordingly, as with the specific statutory tax remedies at issue in *EC Term of Years* and *Hinck*, Congress has enacted "a precisely drawn, detailed" statutory scheme specifically tailored to address respondents' claims for a refund. The detailed and reticulated tax refund scheme is comprehensive: it designates the fora for adjudication, requires an administrative claim, establishes intricate and inter-related limitation periods,

and authorizes judicial relief, including interest. Compare *EC Term of Years*, 127 S. Ct. at 1766, 1767-1768; *Hinck*, 127 S. Ct. at 2015. And, as in *EC Term of Years* and *Hinck*, the statutory restrictions serve the purpose of ensuring the fair and efficient administration of the tax system—purposes that would be frustrated by allowing resort to a more general remedy. *Hinck*, 127 S. Ct. at 2016-2017; *EC Term of Years*, 127 S. Ct. at 1766, 1767-1768. The inescapable conclusion mandated by this Court's recent precedents is that the specific tax refund remedy is exclusive and preempts respondents' attempt to rely on the Tucker Act's general jurisdictional grant while evading all of the specific limitations established by Congress in the tax context. *Ibid.*; see *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").[4]

In particular, the court of appeals' decision to permit respondents to proceed under the general jurisdictional grant of the Tucker Act, 28 U.S.C. 1491(a), subject only to the six-year limitation period established by 28 U.S.C. 2501, is directly at odds with *EC Term of Years*. In that case, the Court noted that the preemptive force of a specifically tailored remedial scheme is "brace[d] * * * when resort to a general remedy would effectively ex-

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[4] To be sure, in *EC Term of Years* and *Hinck*, the general remedy to which resort was precluded was the tax refund remedy, whereas here the tax refund remedy is the specific remedy that would preclude respondents' resort to another remedy. As this Court's cases make clear, however, the important point is that the tax refund remedy is the "better-fitted" of the remedies, *EC Term of Years*, 127 S. Ct. at 1767, and the one that Congress specifically tailored for claims like those at issue here.

tend the limitations period for the specific one." 127 S. Ct. at 1767. Permitting third parties to proceed under the Tucker Act would have had that impermissible effect, and therefore compelled the conclusion that the specifically tailored remedy was exclusive: "We simply cannot reconcile the 9-month limitations period for a wrongful levy claim under § 7426(a)(1) with the notion that the same challenge would be open under § 1346(a)(1) for up to four years." *Id.* at 1768. That reasoning forecloses the result reached by the court of appeals here, because the three-year limitation period for an administrative tax refund claim under 26 U.S.C. 6511(a) simply cannot be reconciled "with the notion that the same challenge would be open under [Section 1491(a)] for up to [six] years." *EC Term of Years*, 127 S. Ct. at 1768.

As respondents' successful claims for the 1997 through 1999 tax years demonstrate, App., *infra*, 4a, respondents could have asserted their Export Clause claims through the specific remedial scheme for tax refunds, if they had timely complied with the requirements of that statutory scheme. See *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369, 1372 (Fed. Cir. 2000), cert. denied, 532 U.S. 1065 (2001) (recognizing that a taxpayer who "complied with the tax refund statute and filed a tax refund action * * * can pursue the theories underlying its constitutionally-based causes of action through its tax refund action"). Like the trust in *EC Term of Years*, respondents should not be allowed to relabel their claims and thereby "effortlessly evade" the restrictions that Congress placed on the remedy specifically tailored for those claims. 127 S. Ct. at 1767-1768. As this Court has observed, "[i]t would require the suspension of disbelief to ascribe to Congress the design to

allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Brown*, 425 U.S. at 833.

The decision below also conflicts with *Hinck* in another respect, because the court of appeals allowed respondents selectively to rely on a benefit of Congress's comprehensive remedial scheme—the allowance of interest—without complying with the restrictions on that same remedial scheme. Just as this Court refused to allow the taxpayers in *Hinck* "to isolate one feature of th[e] 'precisely drawn, detailed statute,'" respondents should not be permitted to "disaggregat[e]" a remedial scheme that "Congress plainly envisioned as a package deal." 127 S. Ct. at 2016.

C. The Court Of Appeals' Decision Also Conflicts With This Court's Precedents In Other Respects

The court of appeals permitted respondents to recover a refund of their excise taxes, and associated interest, through an action for "money damages" in the Court of Federal Claims directly under the Export Clause and the Tucker Act, as an "alternative avenue[]" to "a tax refund action" that is "not subject to compliance with the tax refund statute." *Cyprus Amax*, 205 F.3d at 1373, 1375-1376; see App., *infra*, 2a-3a. That decision cannot be squared with this Court's longstanding precedent.

1. As an initial matter, the court of appeals erred in concluding that the Export Clause, "affords an independent cause of action for monetary remedies." *Cyprus Amax*, 205 F.3d at 1373. Nothing about the prohibitory language of the Export Clause suggests that the

provision is "self-executing," *id.* at 1374, or that it "provides for money damages." *Id.* at 1376.[5]

In addition, the court of appeals' reliance on the Export Clause does not excuse its failure to give effect to the principle that a precisely drawn, detailed statute preempts more general remedies, because this Court has made clear that the same approach is applicable even when (as here) constitutional claims are at issue. In *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court declined to recognize an implied judicial remedy directly under the Constitution for federal employees whose First Amendment rights were violated by their supervisors, because Congress had created a comprehensive civil-service system through which federal employees could challenge adverse personnel actions. *Id.* at 385-390. Although it assumed that the civil-service remedies were "not as effective as an individual damages remedy"

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[5] The language of the Export Clause ("No Tax or Duty shall be laid") is merely prohibitive, in stark contrast to the remedial language included in the Just Compensation Clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation"). See *United States* v. *Testan*, 424 U.S. 392, 401 (1976) (rejecting analogy to the Just Compensation Clause in holding that two federal statutes did not create a claim for money damages). The Export Clause thus cannot "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 400 (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). Moreover, even if a cause of action could be inferred from the Export Clause in the absence of any statutory remedy for a violation of the Clause, Congress has provided a substantial remedy in the tax refund statute, as respondents' successful efforts to recover for the 1997 through 1999 tax years attest. Unlike the plaintiffs in *Bivens* for whom it was "damages or nothing," *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in judgment), here respondents seek a remedy above and beyond that expressly provided by Congress.

under the Constitution, *id.* at 372, the Court framed the relevant question as "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." *Id.* at 388. The Court answered that question in the negative, stating that "we decline 'to create a new substantive legal liability without legislative aid and as at common law,' because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 390 (citation omitted).

2. In any event, even if the Export Clause could be construed to give rise to an implicit independent right of action, precedent of this Court would compel the conclusion that the specific limitations and procedural requirements established by Congress to govern tax refund claims are fully applicable to such claims. Under the plain language of 26 U.S.C. 7422(a) it is the remedy sought—not the source of the litigant's cause of action—that governs whether the statutory prerequisites apply. "*No* suit" for the recovery of "*any* internal revenue tax alleged to have been erroneously or illegally assessed or collected" can be maintained in "*any*" court unless the statute's administrative claim requirements are satisfied. *Ibid.* (emphases added). And, as the prayer for relief in respondents' complaint demonstrates, App., *infra*, 37a-38a (seeking "an award of damages consisting of a refund"), their suit is inherently and necessarily an action to recover illegally collected taxes, not a suit for general damages. Indeed, the court of appeals characterized respondents' relief as a "repayment" or "recovery" of their taxes. *Id.* at 1a-2a. Accordingly,

even assuming the Export Clause is "self-executing," refund actions based on the Export Clause would not be exempt from the restrictions created by Congress to govern all tax refund claims. Cf. *Alexander* v. *"Americans United," Inc.*, 416 U.S. 752, 759 (1974) (observing that decisions of this Court make "unmistakably clear that the constitutional nature of a taxpayer's claim * * * is of no consequence" for purposes of applying the Anti-Injunction Act, 26 U.S.C. 7421, which bars suits to enjoin assessment or collection of a tax).

Indeed, in *New York & Cuba Mail*, this Court rejected a taxpayer's attempt, in a case involving an Export Clause claim, to evade one of the prerequisites for a tax refund suit. There, the taxpayer sought to invoke the jurisdictional provisions of the Tucker Act by relying on a provision of a statute authorizing the government to refund any taxes "in any manner wrongfully collected." See 200 U.S. at 494-495 (quoting Act of May 12, 1900, ch. 393, § 1, 31 Stat. 178). The Court held that the taxpayer could not thereby circumvent the then-applicable requirement that a tax be paid under protest, because that requirement "was clearly demanded for the protection of the Government * * * and without it there would not be the slightest vestige of involuntary payment." *Id.* at 495.[6]

Similarly, precedent of this Court compels rejection of the Federal Circuit's conclusion that, because "the statute of limitations is six years for a cause of action

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[6] The Federal Circuit attempted to distinguish *New York & Cuba Mail* on the ground that the taxpayer there proceeded under a tax refund statute, rather than under the Export Clause. *Cyprus Amax*, 205 F.3d at 1375-1376. If the Federal Circuit's decisions here and in *Cyprus Amax* are correct, however, the taxpayer in *New York & Cuba Mail* likewise should have been entitled to recover.

under the Tucker Act," an independent claim brought directly under the Export Clause would have a six-year limitation period. *Cyprus Amax*, 205 F.3d at 1372 (citing 28 U.S.C. 2501); *ibid.* (stating that "a different statute of limitations pertains to the Tucker Act than to the tax refund statutes"); see App., *infra*, 2a-3a. The Federal Circuit expressly declined to apply the shorter limitation period designed specifically for tax refund actions. Compare 28 U.S.C. 2501 ("[e]very claim" must be filed "*within* six years after the claim first accrues") (emphasis added), with 26 U.S.C. 6511(a) and 6532(a)(1) (mandating shorter limitation periods for tax refund claims).

That holding is squarely inconsistent with this Court's decision in *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447 (1941), which held that the Tucker Act's general six-year limitation period establishes only "an outside limit on the period within which all suits might be initiated" against the United States. The *A.S. Kreider* Court rejected a similar attempt by a taxpayer to avoid the then-applicable statute of limitations specific to tax refund actions. See 313 U.S. at 446. Having failed (like respondents here) to file a timely tax refund action in compliance with that tax-specific provision, the taxpayer (again like respondents) sought to rely upon the longer, six-year statute of limitations in the Tucker Act, which applied generally to "suit[s] against the Government," including but not limited to suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 41(20) (1940). The Court rejected that attempt, reasoning that the shorter and more specific limitation period for tax-refund actions would have "no meaning" if it could be evaded through reliance on the general

Tucker Act limitation period. 313 U.S. at 448. Observing that the six-year limitation was phrased merely as an "outside limit" (*i.e.*, providing that "[n]o suit * * * shall be allowed * * * unless" brought within six years of accrual), the Court held that "nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions." *Id.* at 447 (quoting 28 U.S.C. 41(20) (1940)). In so holding, the Court noted the strong federal policy behind the shorter limitation period: Congress "[r]ecogniz[ed] that suits against the United States for the recovery of taxes impeded effective administration of the revenue laws." *Ibid.*

The current version of the six-year limitation period is likewise phrased as an "outside limit," mandating that "[e]very claim * * * shall be barred unless" filed within six years. 28 U.S.C. 2501. *A.S. Kreider* therefore forecloses the court of appeals' holding that respondents are subject only to the general six-year limitation and not the shorter and more specific regime applicable to tax refund claims.

In fact, the general Tucker Act jurisdictional provision, Section 1491(a)—on which *Cyprus Amax* grounded jurisdiction in the Court of Federal Claims, 205 F.3d at 1373, and from which it inferred the applicability of the Tucker Act's general six-year limitation period, *id.* at 1372—is also the provision that confers jurisdiction in the Court of Federal Claims over tax refund suits in which the entitlement to a refund rests solely on the Internal Revenue Code rather than the Constitution. See 28 U.S.C. 1491(a); see pp. 11-12, *supra*. It is undisputed, however, that in such cases the taxpayers may not rely on the six-year limitation period for Tucker Act claims generally, but are instead subject to the

more specific and less generous provisions of 26 U.S.C. 6511(a), 6532(a)(1), and 7422(a). There is thus no support for the Federal Circuit's refusal to apply in this case the "emphatic" and "highly detailed technical" limitation periods established by Congress for the recovery of taxes. *Brockamp*, 519 U.S. at 350.

3. The court of appeals likewise erred in allowing respondents to evade the restrictions on tax refund actions while benefitting from Congress's decision to allow interest on amounts awarded in such actions. Section 2411 allows an award of interest only in a judgment "for any overpayment in respect of any internal-revenue tax" through "the date of the refund check" issued by the IRS. By its terms, therefore, Section 2411 does not authorize an award of interest in a judgment for non-refund "money damages." But without revisiting the jurisdictional basis upon which its ability to hear the case turn[ed]" (see *Cyprus Amax*, 205 F.3d at 1373), the court of appeals here effectively repudiated any suggestion that the case was for "money damages" (as purportedly distinct from a tax refund). Instead, the court held that interest could be awarded because respondents were entitled to judgment for the "repayment of the export taxes," for "recovery of the illegally levied taxes," and for "recovery of payment of the unconstitutional export tax" (App, *infra*, 1a, 2a), establishing beyond cavil that the court understood the inherent nature of the tax refund it was granting to respondents. See also *id.* at 37a-38a (complaint seeking "damages consisting of a refund").

Furthermore, the court of appeals erred in relying on "general damages principles," App., *infra*, 1a, and the notion that "the government should pay for its use of a taxpayer's money," *id.* at 5a, as a basis for awarding

interest against the government. As this Court has made clear, such principles do not govern awards of interest against the United States, because "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Library of Cong.* v. *Shaw*, 478 U.S. 310, 311 (1986); see *id.* at 317-318; 28 U.S.C. 2516(a) ("Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof.").

Thus, the Federal Circuit's decision to award interest is wholly irreconcilable with its decision to allow respondents to bring this action without complying with the prerequisites of the tax refund remedial scheme, and it exceeds the scope of Congress's waiver of sovereign immunity for interest on refund claims. The court of appeals effectively "disaggregat[ed]" a statutory remedial scheme that "Congress plainly envisioned as a package deal." *Hinck*, 127 S. Ct. at 2016. Respondents cannot have it both ways: this suit cannot be one for "money damages" that is purportedly beyond the reach of the restrictions on tax refund suits in 26 U.S.C. 6511(a), 6532(a)(1), and 7422(a), but at the same time be a suit for the recovery of an "overpayment" of tax on which interest is due under 28 U.S.C. 2411.

4. More broadly, the court of appeals' decision ignores this Court's precedents establishing the principles that must guide courts when construing statutes that involve a waiver of sovereign immunity. Under those precedents, any doubt about whether a remedial scheme precludes resort to other remedies must be resolved in favor of the government. It is axiomatic that the United States cannot be sued unless Congress has waived the

government's sovereign immunity, and such waivers are strictly construed. See, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33, 34, 37 (1992); *Dalm*, 494 U.S. at 608. Terms and conditions that Congress attaches to the legislative waiver of sovereign immunity must therefore be strictly construed. *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). "A statute of limitations requiring that a suit against the government be brought within a certain time period is one of those terms." *Dalm*, 494 U.S. at 608; see *Block*, 461 U.S. at 287.

Thus, when a party fails to commence a suit against the United States within the limitation period, the government has not waived its sovereign immunity, and the courts lack authority to entertain the suit. *Dalm*, 494 U.S. at 608-610. And even when Congress has provided one statute of limitations for a general class of actions, it nevertheless can "provide less liberally for particular actions which, because of special considerations, require[] different treatment." *A.S. Kreider Co.*, 313 U.S. at 447. Congress has done precisely that with respect to tax refund suits. *Ibid.*; see 26 U.S.C. 6511(a), 6532(a)(1). To allow taxpayers like respondents to avoid the restrictions on Congress's waiver of the United States' sovereign immunity for tax refund claims by seeking a refund directly under the Export Clause would improperly permit Congress's "careful and thorough remedial scheme to be circumvented by artful pleading." *Brown*, 425 U.S. at 833.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS THIS COURT'S REVIEW

The decision of the court of appeals will affect the administration of the tax laws throughout the United

States, and the potential ramifications are not limited to the Export Clause. Because the Court of Federal Claims is a court of national jurisdiction, any similarly situated taxpayer who fails to satisfy the prerequisites of the tax refund remedy can, through artful pleading, avail himself of the more generous terms of the remedy recognized by the Federal Circuit. Moreover, any tax alleged to violate a provision of the Constitution would be a potential candidate for an independent action under the Federal Circuit's rationale. See, *e.g.*, U.S. Const. Art. I, § 8, Cl. 1 and § 9, Cl. 4 (Direct Tax and Uniformity Clauses, both of which are framed in mandatory terms similar to the Export Clause). The large loophole that the Federal Circuit has created in the comprehensive tax remedial scheme crafted by Congress should not be allowed to remain open.

The question presented is one of significant financial and practical consequence to the United States. As of the filing of this petition, there are more than 25 other cases (many with multiple plaintiffs) seeking the recovery of coal excise taxes and related interest for which timely claims for refund were not filed that are pending in the Federal Circuit and the Court of Federal Claims.[7] In similar circumstances, this Court has recognized the need for this Court's review. See, *e.g.*, *United States* v.

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[7] The government notes that bills are currently pending in committees in Congress that, if passed, could resolve the question presented with respect to the coal excise tax in particular. See S. 373, 110th Cong., 1st Sess. (2007); H.R. 1762, 110th Cong., 1st Sess. (2007). This Court's review is nonetheless warranted. Similar bills were introduced in the previous Congress but were not enacted, and there is no evident reason to expect a different result now. See S. 2884, 109th Cong., 2d Sess. (2006); H.R. 5097, 109th Cong., 2d Sess. (2006); H.R. 3771, 109th Cong., 2d Sess. (2006).

Hill, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763 (2007), and *Hinck* v. *United States*, 127 S. Ct. 2011 (2007). In the alternative, the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

RICHARD T. MORRISON
Acting Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

KENNETH L. GREENE
STEVEN W. PARKS
Attorneys

SEPTEMBER 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

04-5155, -5156

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY, AND PREMIER ELKHORN COAL COMPANY, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-CROSS-APPELLANT

Decided: Jan. 22, 2007

Before: NEWMAN, GAJARSA, and LINN, *Circuit Judges.*

NEWMAN, *Circuit Judge.*

Clintwood Elkhorn Mining Co., Gatliff Coal Co., and Premier Elkhorn Coal Co. (collectively "Clintwood") appeal the decision of the United States Court of Federal Claims[1] denying interest on the repayment of the export taxes they had paid in an unconstitutional levy. In view of statutory provisions of the tax laws as well as general damages principles, we conclude that the Court of Federal Claims erred in holding that no interest was payable on recovery of the illegally levied taxes.

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[1] *Sub nom. Andalex Resources, Inc. v. United States*, No. 00-cv-249 (Fed. Cl. July 21, 2004).

The United States cross appeals, asking this court to reconsider and overturn our decision in *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000), which recognized the Tucker Act jurisdiction of the Court of Federal Claims for claims directed to recovery of payment of the unconstitutional export tax. We confirm the jurisdiction of the Court of Federal Claims.

BACKGROUND

By statute, 26 U.S.C. § 4121(a)(2), effective 1978, tax was levied, *inter alia*, on exports of coal from United States mines. In *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998) this export tax was held to be unconstitutional. The United States did not appeal the *Ranger Fuel* decision, and the Internal Revenue Service issued a notice of acquiescence in May 2000. Thereafter various coal producers and exporters, including the plaintiffs herein, filed Tucker Act claims requesting damages in the amount of the export tax and interest. Recovery was sought for the prior six years, which is the statutory period of limitations for Tucker Act claims. In the Court of Federal Claims the government challenged recovery beyond three years, and also challenged the claim for interest on the recovered tax payments.

I

In *Cyprus Amax* this court held that compensation for violation of the Export Clause is not limited to the administrative processes of the Internal Revenue Service, and that the taxpayer can sue in the Court of Federal Claims and "recover for payment of taxes under the Export Clause independent of the tax refund statute," *i.e.*, without first filing an administrative refund

claim with the IRS. 205 F.3d at 1374. The government asks for *en banc* reversal of *Cyprus Amax*, and urges that suit cannot be brought under the Tucker Act for refund of taxes levied in violation of the Constitution. This question was fully aired at the time of *Cyprus Amax*, was decided by a unanimous panel, was denied rehearing and rehearing *en banc*, and the government's petition for writ of certiorari was denied. We discern no basis for reopening this question.

The Court of Federal Claims, applying *Cyprus Amax*, held that there was Tucker Act jurisdiction of Clintwood's refund claims. We confirm that jurisdictional ruling.

II

A consequence of Tucker Act jurisdiction is that the statute of limitations is six years, 28 U.S.C. § 2501, whereas refund claims brought administratively to the Internal Revenue Service are limited to recovery of overpayments for the preceding three years. *See* 26 U.S.C. § 6511(a). Clintwood filed Tucker Act claims for the three tax years 1994 through 1996 and administrative claims for the tax years 1997 through 1999. The Court of Federal Claims acknowledged that, in view of *Cyprus Amax*, Clintwood could either proceed in court under the Tucker Act, or seek an administrative tax refund under the Tax Code. *Andalex Resources Inc. v. United States*, 54 Fed. Cl. 563 (2002). Entitlement to recovery of the export taxes paid is not at issue, and the parties have agreed as to the amount of taxes paid during 1994-1999.

However, the Court of Federal Claims held that Clintwood is not entitled to interest on the recovered export taxes for the earliest three of the six years, that is,

for 1994 through 1996. The court held that since Clintwood had not filed an administrative claim for refund for those years, then interest cannot be recovered on the refund for those years. The government does not dispute entitlement to interest for the refund for 1997 through 1999, because an administrative claim was filed for those years.

Interest on overpayment of any internal revenue tax is provided by statute:

> 28 U.S.C. § 2411. In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.

The Court of Federal Claims concluded that § 2411 does not apply to the three years in which the administrative steps for refund under the Tax Code were not taken. The government argued, and the court agreed, that administrative refund requests under 26 U.S.C. § 6511 cannot be bypassed by judicial action, and that since recovery is limited to the prior three years under § 6511, interest for six years cannot be paid when the refund is obtained under the Tucker Act. *Andalex Resources*, 54 Fed. Cl. at 565 ("Plaintiffs have chosen to pursue their claims independently of the tax refund system, so they

may not use the § 2411 waiver of sovereign immunity for interest payments.") Thus the court denied interest for the three earliest tax years, for Clintwood did not follow the IRS administrative procedure for those years. The court relied on *Economy Plumbing & Heating Co. v. United States*, 470 F.2d 585, 592 (Ct. Cl. 1972), for the statement that 28 U.S.C. § 2411 applies "only to taxpayers who have overpaid their taxes, have filed a timely claim for refund, and are within the administrative system providing for the recovery of overpaid taxes and are entitled to its benefits." However, *Economy Plumbing* was not a tax refund case, and the quoted statement was made only to explain that § 2411 did not apply to a contract dispute where the contractor sought interest on a contract adjustment it had received from the government. *Economy Plumbing* cannot be extended to the present case.

No precedent has been cited or found to the effect that interest is barred on Tucker Act recovery except for the period during which the plaintiff could have obtained interest through an administrative procedure. Such a convoluted threshold is not imposed by § 2411, which is a straightforward recognition that the government should pay for its use of a taxpayer's money to which the government was not entitled.

The legislative history of § 2411 is directly relevant to this conclusion. In 1924 Congress repealed the requirement that a refund claim must be filed as a precondition to receiving interest under the predecessor of 26 U.S.C. § 2411. The House Report explained that

> if the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest during the

> period of their retention; and the fact of protest or a claim does not affect the merits of such an interest payment.

H. Rep. No. 68-179, at 35 (1924). The Report explained that a tax overpayment is not fully remedied unless it includes interest for the time that the money was in the hands of the government. *Id.* There is no basis now to narrow the principle of § 2411 through reimposing this long-dead administrative requirement.

The threshold requirement under § 2411 is a judgment for the overpayment. Section 2411 provides for interest on "any judgment of any court" for "any overpayment in respect to any internal-revenue tax," and the term "overpayment" has been defined by the Supreme Court as including a tax "erroneously or illegally assessed or collected." *Jones v. Liberty Glass Co.*, 332 U.S. 524 (1947). In *Liberty Glass* the Court discussed the term "overpayment" and saw "no basis for making it over into a word of art." 332 U.S. at 532. Neither law nor logic supports the government's position that no interest can be paid under § 2411 except for the period for which interest could be paid under § 6511.

The judgment of the Court of Federal Claims, denying interest on the first three years of Clintwood's Tucker Act recovery, is contrary to law and is reversed. We remand for the award of interest on the refunded export taxes for the entire period of recovery.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-249 T

CLINTWOOD ELKHORN MINING COMPANY,
GATLIFF COAL COMPANY, AND
PREMIER ELKHORN COAL COMPANY

v.

THE UNITED STATES

[Filed: July 21, 2004]

JUDGMENT

Pursuant to the parties' July 12, 2004 Stipulated Judgment and the court's July 15, 2004 directive authorizing the clerk to enter judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff shall recover of and from defendant, United States, the sum of $1,065,936, as set forth on the attached Exhibit A. No interest. All parties shall bear their own costs, including any possible attorney's fees or other expenses of this litigation.

Brian Bishop
Clerk of Court
By: /s/ ILLEGIBLE
Deputy Clerk

July 21, 2004

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $255.00.

Exhibit A

STIPULATED JUDGMENT AMOUNTS IN
CLINTWOOD ELKHORN MINING CO., ET AL.
v. *UNITED STATES, FED. CL. NO. 00-249T*

	Clintwood Elkhorn Mining Company	Gatliff Coal Company	Premier Elkhorn Coal Company
1Q/94	$ 24,675	$ 4,055	$ 0
2Q/94	100,534	19,463	0
3Q/94	85,914	25,470	0
4Q/94	103,004	21,452	0
1Q/95	68,086	22,909	0
2Q/95	105,214	19,304	6,883
3Q/95	113,813	10,308	27,874
4Q/95	115,815	15,434	14,873
1Q/96	87,037	11,226	13,423
2Q/96	0	23,615	0
3Q/96	0	17,287	0
4Q/96	0	8,268	0
Totals	**$804,092**	**$198,791**	**$63,053**

APPENDIX C

UNITED STATES COURT OF FEDERAL CLAIMS

No. 99-268T; 00-245T; 00-634T; 98-414T; 00-457T; 00-249T; 00-244T; 99-299T; 00-243T; 97-68T; 97-310T; 97-311T; 97-317T; 97-521T; 97-522T; 98-557T; 98-200T; 01-252T; 00-218T; 00-216T; 00-248T; 00-762T; 00-247T; 99-301T; 01-423T; 00-236T; 99-298T; 00-250T; 01-422T; 00-242T; 00-246T; 00-467T; 01-252T; 00-148T; 02-200T

ANDALEX RESOURCES, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 20, 2002]

ORDER

Defendant's Protective Motion for Partial Dismissal or for Partial Summary Judgment is DENIED[.] Counsel agree it is not necessary for plaintiffs to file responses to defendant's motion, and we concur.

/s/ ILLEGIBLE
Robert H. Hodges, Jr.
Judge

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

Nos. 99-268T; 00-241T; 00-245T; 00-634T; 98-414T; 00-634T; 00-457T; 00-249T; 00-244T; 99-299T; 00-243T; 97-68T; 97-310T; 97-311T; 97-317T; 97-521T; 97-522T; 98-557T; 98-200T; 01-252T; 00-218T; 00-216T; 00-248T; 00-762T; 00-247T; 99-301T; 01-423T; 00-236T; 99-298T; 00-250T; 01-422T; 00-242T; 00-246T; 00-467T; 01-252T; 00-148T; 02-200T

ANDALEX RESOURCES, INC. ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Nov. 19, 2002

OPINION

HODGES, Judge.

The opinion that follows was issued on July 23, 2002, then withheld because the Federal Circuit's opinion in *United States Shoe Corporation*, was distributed the same day. *See United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002). We issued an Order on July 25 advising the parties of the opinion granting defendant's motion for summary judgment, and

asked how they wished to proceed in light of the *U.S. Shoe* decision[1].

We held a hearing on August 29 to discuss the effect of the Federal Circuit's opinion on this case, and the parties briefed the issue further in September. We have considered the parties' arguments, and submit the opinion herewith as it was drafted.

INTRODUCTION

Plaintiff coal producers paid federal taxes on their shipments of coal pursuant to 26 U.S.C. § 4121. Some of the shipments included exports. A federal district court held that the coal tax was unconstitutional when applied to exports. *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998). The Government did not appeal this holding. The Internal Revenue Service issued a notice of acquiescence to the *Ranger Fuel* ruling in May 2000. *See* Notice 2000-28, 2000-21 LR. B. 1116 (May 22, 2000). Plaintiffs subsequently brought claims for refunds in this court under the Tucker Act and filed motions for summary judgment on the issue of interest on those claims. *See Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001).

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[1] "While the export clause provides plaintiffs with an alternate and independent avenue for tax overpayment recovery, the provision is not interest-mandating. Because the export clause does not contain a constitutional waiver of sovereign immunity, plaintiffs cannot recover interest under that provision. On that basis, we would grant defendant's cross-motion for summary judgment." *Andalex Resources, Inc., et al. v. United States*, No. 99-268T (Fed. Cl. July 25, 2002).

The Government filed a cross-motion for partial summary judgment on the interest issue. We grant defendant's cross-motion for partial summary judgment.

BACKGROUND

The Federal Circuit reversed this court's holding that the Court of Federal Claims lacked jurisdiction to entertain plaintiffs' constitutionally-based tax claims because they had not observed administrative tax refund requirements. *See Cyprus Amax*, 205 F.3d at 1371. The Circuit explained that plaintiffs met the jurisdictional requirements of this court because "the Export Clause is self-executing." *Id.* at 1374. Therefore, "a party can recover for payment of taxes under the Export Clause independent of the tax refund statute." *Id.*

The appeals court explained that plaintiffs "had two alternate avenues through which to obtain relief—a tax refund action or a cause of action based on the Export Clause—and either one is sufficient to invoke the Court of Federal Claims' jurisdiction under the Tucker Act." *Id.* at 1375. The Export Clause provides plaintiffs with an alternate means to recover their tax overpayments under the Tucker Act. The Circuit's *Cyprus Amax* decision permits plaintiffs to use the Tucker Act's six-year statute of limitations without complying with the administrative tax refund requirements. *Id.* at 1372. Plaintiffs "can potentially recover an additional three years of taxes under the Tucker Act than under a tax refund claim." *Id.* at 1372-73. Now plaintiffs seek awards of interest added to any judgments of tax overpayment that this court may allow.

DISCUSSION

Plaintiffs employ the alternate avenue of relief supplied by the Export Clause of the Constitution and by the ruling of the Federal Circuit in *Cyprus Amax*. By choosing this avenue, they can recover six years of tax overpayments instead of the three years that would have been permitted according to the administrative process of the tax code. Their claims for interest are predicated both upon the statutory provisions of 28 U.S.C. § 2411 and upon the Export Clause of the Constitution.

28 U.S.C. § 2411 Claims

"[T]he United States upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest." *United States v. Rogers*, 255 U.S. 163, 169 (1921) (citations omitted). According to plaintiffs, Congress provided the necessary waiver of sovereign immunity for us to award them interest, in 28 U.S.C. § 2411. Section 2411 of Title 28, United States Code, provides a pertinent part:

> In any judgment of any court rendered (. . . against the United States . . .) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.

28 U.S.C. § 2411. Plaintiffs assert that this court must award interest on their claims because they will receive:

1) a judgment rendered against the United States; 2) for an overpayment; 3) in respect of an internal revenue tax.

The Government contends that plaintiffs' choice to pursue their claims under the Export Clause of the Constitution precludes their claims for pre-judgment interest under § 2411. Congress enacted § 2411 to aid in judicial enforcement to tax refunds; it is essentially a tax refund statute. Plaintiffs have chosen to pursue their claims independently of the tax refund system, so they may not use the § 2411 waiver of sovereign immunity for interest payments.

28 U.S.C. § 2411 Waiver of Immunity

The Tucker Act gives this court jurisdiction to hear tax refund actions. "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon . . . any Act of Congress . . ." 28 U.S.C. § 1491. The Tucker Act includes a six-year statute of limitations. *See* 28 U.S.C. § 2501. The Tucker Act is a jurisdictional statute and its statute of limitations is general.[2] As a result, tax refund claims brought in the Court of Federal Claims under the Tucker Act generally retain the shorter limitations provided by the Internal Reven-

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[2] The Court of Federal Claims explained this in *West Publ'g Co. Employees' Preferred Stock Ass'n v. United States*, 198 Ct. Cl. 668, 674 n.6 (1972) (quoting *United States v. A.S. Kreider Co.*, 313 U.S. 443, 447 (1941)):

> [T]here has been no question but that the general six-year statute was intended only as an outside limit on the period within which all suits against the United States might be begun, and that "Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment."

ue Code, 26 U.S.C. § 6511 (2002).[3] The IRC limitations apply in situations like plaintiffs' where a statute is declared unconstitutional after the parties have paid taxes:

> The statute of limitation on the right to a refund or to recover any amount assessed and collected as a tax cannot be made to depend upon the question of whether there was any legal authority for the assessment and collection. [Otherwise] the statute of limitation would be practically of no force or effect. The statute of limitation is jurisdictional in this court, and when . . . the time within which a person may bring a suit against the United States has expired, or that plaintiff has not complied with the requirements necessary to give him a right to maintain a suit, this court is without jurisdiction to entertain it.

West Publ'g Co. Employees' Preferred Stock Ass'n v. United States, 198 Ct. Cl. 668, 674-75 (1972) (quoting *Wisconsin National Life Ins. Co. v. United States*, 70 Ct. Cl. 433, 438 (1930)).

Tax refund claims brought under Tucker Act jurisdiction are further restricted by administrative requirements. "[A]n administrative claim must be filed before a suit seeking a refund may be brought *in any court*." *Williams v. United States*, 11 Cl. Ct. 189, 191

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[3] 26 U.S.C. § 6511(a) provides in pertinent part:

> Period of limitation on filing claim. Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid . . [.]

(1986), *aff'd* 818 F.2d 877 (Fed. Cir. 1987) (citing 26 U.S.C. § 7422(a)) (emphasis added). As a result, "[f]ailure to plead and demonstrate that a timely administrative claim has been filed . . . wrests jurisdiction from this court." *Id.* at 191-92.

Plaintiffs must file timely refund claims with the IRS, followed by complaints submitted to this court demonstrating their adherence to administrative requirements, to receive judgments under the Tucker Act. If the court renders judgment in their favor, and the refund is based upon a tax overpayment, 28 U.S.C. § 2411 provides interest on the judgment. Plaintiffs would avoid the shorter statute of limitations, and the administrative requirements of the tax refund statutes by using the Export Clause for jurisdiction, while returning to the tax statutes to obtain interest pursuant to § 2411.

28 U.S.C. § 2411 Interest

Plaintiffs are not seeking tax refunds, yet they claim that 28 U.S.C. § 2411 authorizes awards of interest on their claims. They contend that § 2411 provides interest on any judgment for restitution of tax overpayments, regardless of whether the claimant adhered to administrative tax refund requirements.

Plaintiffs chose to pursue their claims for damage under the Export Clause rather than as tax refunds pursuant to the Tax Code. "Because their claims are not for tax or penalty refunds, their claims do not fall within the jurisdiction of the Court of Federal Claims pursuant to 28 U.S.C. § [] . . . 1491, the statute[] that give[s] the Court of Federal Claims jurisdiction over claims for tax refunds." *Brown v. United States*, 105 F.3d 621, 623

(1997).[4] As the Federal Circuit explained, plaintiffs have removed themselves from the tax refund system and this court's jurisdiction over tax refund claims. *Id.* Plaintiffs' claims here fall within the jurisdiction of this court only because the Export Clause provides them with an independent cause of action for a monetary remedy. *Cyprus Amax*, 205 F.3d at 1374.

Title 28 U.S.C. § 2411 permits claimants to receive pre-judgment interest in tax refund cases. It provides an express waiver of sovereign immunity for such claims against the Government. *See Library of Congress v. Shaw*, 478 U.S. 310, 318 n.6 (1986). Claimants must be within the tax refund system to receive interest pursuant to § 2411, however. The Court of Claims so ruled in *Economy Plumbing & Heating Co. v. United States*, 470 F.2d 585 (1972). The court explained:

> We do not think that the provisions of 28 U.S.C. § 2411[] and Section 6611 of the Internal Revenue Code providing for interest . . . upon "any overpayment in respect of any internal-revenue tax" . . . has any application to this case. We interpret those statutes as applying only to taxpayers who have overpaid their taxes, have filed a timely claim for refund, *and are within the administrative system providing for the recovery of overpaid taxes and are entitled to its benefits.*

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[4] In *Brown*, the Federal Circuit declared that plaintiff taxpayers' claims for monetary damages based upon fraudulent takings and Fourth Amendment violations lacked subject matter jurisdiction in the Court of Federal Claims under the Tucker Act's tax refund jurisdiction. *See Brown v. United States*, 105 F.3d 621 (1997).

Id. at 591-92 (emphasis added).[5] Plaintiffs in this case are taxpayers who overpaid their taxes and they filed claims for refunds. However, they brought this action under the Export Clause, and are not entitled to the benefits of the tax refund system.

Tax refund statutes apply to tax refund actions. Plaintiffs may not use § 2411 to recover interest on any judgment that this court may render regarding plaintiffs' principal claims. We may award interest only if the Export Clause mandates interest.

Export Clause Claims

Plaintiffs claim that constitutional provisions carrying a requirement for monetary awards inherently provide for interest awards. In effect, any money-mandating Constitutional provision implies a similar Constitutional mandate for interest. We agree with the Government that this court may award pre-judgment interest on plaintiffs' Constitutionally-based claims only if the Export Clause mandates such an award.

Plaintiffs argue that money-mandating constitutional provisions implicitly are interest-mandating provisions. *See Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986). They contend that this argument that the Constitution requires payment of interest is supported by court rulings under the Fifth Amendment Takings Clause and the Judicial Compensation Clause of Article III.

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[5] In *Economy Plumbing*, the Court of Claims considered whether plaintiffs, who originally brought suit under a contract claim, could use 28 U.S.C. § 2411(a) to recover interest. *See Economy Plumbing*, 470 F.2d 585 (1972).

Fifth Amendment Takings Clause

"[T]he United States is not liable to interest except where it assumes the liability by contract or by the express words of a statute, or must pay it as part of the just compensation required by the Constitution." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 47 (1928) (citing *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304, 306 (1923)). The Court later noted that "[t]he allowance of interest in eminent domain cases is only an apparent exception [to the "no-interest" rule], which has its origin in the Constitution." *Smyth v. United States*, 302 U.S. 329, 353 (1937) (citing *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 497 (1937)). "The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is part of such compensation." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923).

Plaintiffs argue that the Fifth Amendment's requirement that interest be paid arises not from the Constitution's mandate for payment of "just compensation," but from the constitutional roots of the Fifth Amendment itself. They offer *Hatter v. United States*, 38 Fed. Cl. 166 (1997), which involves Article III of the Constitution, as support for this argument. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997).

Article III Judicial Compensation Clause

The Federal Circuit ruled that Article III of the Constitution is money-mandating, as it relates to judicial compensation. *Hatter v. United States*, 953 F.2d 626, 628 (Fed. Cir. 1992). Article III "mandates the payment

of money in the event of . . ." its violation. *Id.* at 628. The court reasoned that the provision declares "in mandatory and unconditional terms, that judges' salaries 'shall not be diminished during their Continuance in Office.'" *Id.* The compulsory language of the Article and its implied mandate for repayment "presupposes damages as the remedy for a governmental act violating the [provision]." *Id.*

The Court of Federal Claims ruled that Article III is interest-mandating. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997).[6] The court derived this affirmative requirement from the language of Article III "specifically requir[ing] that judicial compensation be paid 'at stated Times.'" *Id.* at 183 (citations omitted). The cardinal objective of the provision "is to maintain the independence of the federal judiciary." *Id.* The court reasoned that a failure to award interest for violations of the Judicial Compensation Clause would threaten this independence because "Congress would then be free to delay indefinitely payment of the principal amount of protected compensation leaving the judges with no remedy for delay." *Id.*

Plaintiffs maintain that the trial court's view of Article III as an interest-mandating provision follows logically from the Federal Circuit's holding that Article III "mandates the payment of money in the event of a prohibited compensation diminution." *Hatter*, 953 F.2d

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[6] The Federal Circuit considered issues arising from the *Hatter* litigation five times, but that court has not ruled on whether interest is available under the Judicial Compensation Clause. We do not agree with plaintiffs' suggestion that the Federal Circuit accepted the Court of Federal Claims' award of interest in *Hatter v. United States*, 38 Fed. Cl. 166 (1997); the decision was not appealed.

at 628. Plaintiffs contend that the necessary implication of the *Hatter* decisions is that any Constitutional provision providing a cause of action for money damages provides also a cause of action for pre-judgment interest. This argument does not resolve the issue of defendant's sovereign immunity to interest liability.

Plaintiffs point out that the Export Clause and Article III employ wholly prohibitive language, and both are money-mandating. Because the Compensation Clause is interest-mandating, the Export Clause must be as well, they contend.

The Export Clause and Article III employ similar prohibitive language. The Federal Circuit stated that, "[b]oth clauses speak in absolute and unconditional terms, and both protect pecuniary interests." *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1375 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001). The Export Clause, like the Judicial Compensation Clause, is money-mandating. *Cyprus Amax*, 205 F.3d at 1373.[7] Both arise under the Constitution. Such similarities do not compel this court to hold that the Export Clause is also interest-mandating, however.

Prohibition Does Not Equate To Interest-Mandating

The Export Clause and Article III use prohibitive language, but an affirmative requirement of restorative compensation is present only in the Compensation Clause. The Court of Federal Claims grounded its

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[7] The Federal Circuit determined that, "given a fair textual interpretation, the language of the Export Clause leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy." *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001).

award of pre-judgment interest for violations of Article III upon this affirmative requirement. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997). The court reasoned that the affirmative requirement derives from the language of Article III requiring payment of judicial compensation at specific times and that the compensation paid may not be diminished. *Id* at 182-83. "There is a sounder basis for interest on delayed compensation protected under Article III than on just compensation guaranteed by the Fifth Amendment." *Id.* The court predicated this resolution upon Article III's requirement of payment "at stated Times" and upon the Clause's purpose of preserving the autonomy of the federal judiciary. *Id.* The Export Clause lacks such an affirmative requirement or implied right to pre-judgement interest.

The Export Clause contains a proscription against certain government actions. The Supreme Court stated that the "text of the Export Clause . . . expressly prohibits Congress from laying any tax or duty on exports." *United States v. Int'l Bus. Machs[.] Corp.*, 517 U.S. 843, 852 (1996). The language of the Export Clause establishes the provision as a bare prohibition against taxation. It lacks the affirmative requirement for an award of pre-judgment interest discerned in the judicial Compensation Clause. The Court of International Trade arrived at the same conclusion. *See Swisher Intern., Inc. v. United States*, 178 F. Supp. 2d 1354 (Ct. Int'l. Trade 2001).[8]

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[8] Plaintiffs in *Swisher* appealed the Court of International Trade's holding soon after the court released its slip opinion. One of the issues currently on appeal before the Federal Circuit is the denial of plaintiffs' claim for an award of pre-judgement interest under the Export Clause.

> The Export Clause merely contains a prohibition against government action . . . [I]t is not an absolute and affirmative requirement to restore Plaintiffs to their prior position. It is this affirmative requirement that fully waives sovereign immunity under the [Takings] Clause of the Fifth Amendment and perhaps under Article III.

Swisher, 178 F. Supp. 2d at 1362.

"The framers of the constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text . . . " *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). The Export Clause is unambiguous. The prohibition against governmental action does not imply a requirement for an award of interest.

The Export Clause lacks any form of directive that parallels Article III's requirement for compensation payment "at stated Times". The Court of Federal Claims expressed the importance of this timing requirement in its holding that Article III provides pre-judgment interest. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997).

The court reasoned that the underlying purpose of the Judicial Compensation Clause "is to maintain the independence of the federal judiciary" by providing a remedy for its violation. *Hatter*, 38 Fed. Cl. at 183. The purpose of the Export Clause is "the requirement . . . that exports should be free from any governmental burden." *See e.g., United States v. Hvoself*, 237 U.S. 1,

15 (1915) (*quoting Fairbank v. United States*, 181 U.S. 282, 290 (1901).[9]

The Export Clause does not require a self-contained and all-encompassing remedy to further its purpose. The Internal Revenue Code provides full compensatory remedies for violations of the Export Clause. Claimants may take advantage of these remedies so long as they follow the administrative requirements discussed previously in the § 2411 analysis. The holding in *Cyprus Amax* provides plaintiffs with an alternate and independent avenue of relief under the Export Clause to recover their tax overpayments. *Cyprus Amax*, 205 F.3d at 1375. A finding that the Export Clause is interest-mandating would not further the underlying purpose of the provision. Such a holding would neither prevent the imposition of tax burdens upon exports, nor provide claimants with a unique remedy for violations of the clause. The *Hatter* rationale for finding that Article III is interest -mandating does not apply to the Export Clause. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997).

Money-Mandate Does Not Mean Interest-Mandate

Plaintiffs next rely upon statements made by the Federal Circuit that the Export Clause is money-mandating. *Cyprus Amax*, 205 F.3d at 1373. They argue

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[9] Plaintiffs suggest that an award of interest would further the purpose of the Export Clause because "exports should not be made a source of revenue to the national government." *Fairbank v. United States*, 181 U.S. 282, 292-93 (1901). However, the *Fairbank* court stated that this is only part of the Export Clause's purpose. *Id.* It is not equivalent to the primary, underlying purpose of Article III that was given so much weight by the *Hatter* court. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997).

that money-mandating constitutional provisions require money damages, which include compensation. Compensation is the basis for interest awards under the Constitution. As the Export Clause arises under the Constitution, it requires an award of pre-judgment interest.

The *Cyprus Amax* court did not suggest that the Export Clause is interest-mandating. *See Cyprus Amax*, 205 F.3d 1369 (Fed. Cir. 2000). The court did not address the issue of interest at all. The only issue considered by the Federal Circuit in *Cyprus Amax* for the purposes of this analysis was the Export[] Clause's ability to provide "an independent cause of action for [a] monetary remed[y]." *Id.* at 137. The Circuit concluded that "the Export Clause's restriction on taxing power requires Congress to refund money obtained in contravention of the clause." *Id.* at 1373.

A money-mandating provision is not necessarily an interest-mandating provision. The Supreme Court has observed that "[t]he allowance of interest on damages is not an absolute right." *Boston Sand & Gravel*, 278 U.S. at 41, 49 (quoting *The Scotland*, 118 U.S. 507, 518 (1886)).

The Takings Clause and the Compensation Clause do not confer rights to interest based only upon their money-mandating nature. The unique language found in both Constitutional provisions requires the Government to restore claimants to the relative positions that they would have occupied but for the violations.

> [T]he reasoning on which interest is added to value as a part of "just compensation" . . . is not applicable to this situation. That reasoning is that when a court determines just compensation, it first fixes

> bare value at the time of the taking and adds a sum to compensate for deferred payment of bare value so as to make the property owner whole *as required by the Fifth Amendment.*

Albrecht v. United States, 329 U.S. 599, 603 (1947) (emphasis added). "It is the meaning embodied in the term 'just compensation' which creates the requirement that the government provide a 'full and exact equivalent' in the form of interest." *Olson v. United States*, 292 U.S. 246, 254-55 (1934)).

The Constitution requires waiver of sovereign immunity for the recovery of interest against the Government. "In the absence of *constitutional requirements*, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress." *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 658-59 (1947) (emphasis added). The Export Clause lacks such a constitutional requirement.

CONCLUSION

Plaintiffs brought their claims in this court under the Export Clause of the Constitution. They do not assert a tax refund suit under the Tucker Act. Title 28 U.S.C. § 2411 provides a statutory waiver of sovereign immunity to interest liability only for claims brought within the tax refund system. Plaintiffs do not seek a tax refund, so they cannot recover interest under § 2411. While the Export Clause provides plaintiffs with an alternate and independent avenue for recovery, an overpayment of tax in this case, it is not interest-mandating. It does not contain a Constitutional waiver of sovereign immunity, and plaintiffs cannot recover interest under its terms.

Plaintiffs' Cross-Motion for Summary Judgment is DENIED. Defendant's Cross-Motion is GRANTED.

/s/ ILLEGIBLE
Robert H. Hodges, Jr.
Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-5155, -5156

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY, AND PREMIER ELKHORN COAL COMPANY, PLAINTIFFS-APPELLANT

v.

UNITED STATES, DEFENDANT-CROSS APPELLANT

[Filed: Apr. 27, 2007]

NOTE: This order is nonprecedential.

A petition for rehearing en banc having been filed by the Cross-Appellant, and a response thereto having been invited by the court and filed by the Appellants and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 4, 2007.

FOR THE COURT

/s/ ILLEGIBLE
Jan Horbaly
Clerk

Dated: 04/27/07

cc: Steven H. Becker
Steven W. Parks

APPENDIX F

UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-249 T

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY, AND PREMIER ELKHORN COMPANY, PLAINTIFFS

v.

UNITED STATES, DEFENDANT

[Filed: Apr. 28, 2000]

COMPLAINT

Plaintiffs, Clintwood Elkhorn Mining Company, Gatliff Coal Company, and Premier Elkhorn Coal Company, by their attorneys, Coudert Brothers, bring this action against defendant, the United States, and for their complaint herein allege, on knowledge as to matters pertaining respectively to themselves, and on information and belief as to all other matters, as follows:

NATURE OF ACTION

1. This is an action seeking damages including recovery of manufacturers' excise taxes imposed and paid in respect of export sales of coal pursuant to 26 U.S.C. § 4121

(hereinafter the "Coal Sales Tax") and seeking a declaratory judgment that the Coal Sales Tax statute is unconstitutional and void *ab initio*.

PARTIES

2. Plaintiffs in this action, Clintwood Elkhorn Mining Company, Gatliff Coal Company, and Premier Elkhorn Coal Company, are listed in the attached Schedule A. They are producers, sellers and exporters of coal and are bringing this action in their respective individual capacities for their respective individual claims to recover Coal Sales Tax assessments paid by each on export sales, either made by them or by corporate affiliates or predecessors who have made such sales and assigned all claims to them. Each Plaintiff has standing in this action because each has paid the Coal Sales Tax in respect to its export sales (or holds valid assignments in respect of such claims) which were illegally assessed and collected in contravention of the U.S. Constitution and the supreme law of the land. No such taxes have been passed on or included in export sales prices paid by any other entity.

JURISDICTION

3. This Court possesses jurisdiction over this action by reason of 28 U.S.C. §§ 1491(a)(1), 2401, and 2501, the Export Clause of the United States Constitution, the Fifth Amendment of the United States Constitution, and the implied contract formed between Plaintiffs and the government for the return of taxes that are void *ab initio*.

FACTUAL ALLEGATIONS

4. Article, I, Section 9, Clause 5 (the "Export Clause") of the United States Constitution provides that "No Tax or Duty shall be laid on Articles exported from any State."

5. In 1978 Congress enacted Pub. L. No. 95-277 § 2(a), 92 Stat. 11 (1978), to impose an excise tax on the sale of coal. The Act, codified in the Internal revenue Code (the "Code") at 26 U.S.C. § 4121, as amended, reads in pertinent part as follows:

§ 4121 Imposition of Tax

(a) Tax Imposed.

(1) In general.—There is hereby *imposed on coal* from mines located in the United States *sold by the producer*, a tax equal to the rate per ton determined under subsection (b).

(2) Limitation on tax.—The amount of the tax imposed by paragraph (1) with respect to a ton of coal shall not exceed the applicable percentage (determined under subsection (b)) of the price at which such ton of coal *is sold* by the producer.

(b) Determination of rates and limitation of tax.—For purposes of subsection (a)

(1) the rate of the tax on coal from underground mines shall be $1.10,

(2) the rate of tax on coal from surface mines shall be $ .55, and

(3) the applicable percentage shall be 4.4 percent.

* * *

(e) **Reduction in the amount of Tax.—**

(1) **In general.—***Effective with respect to sales* after the temporary increase termination date, subsection (b) shall be applied—

(A) by substituting "$.50" for "$1.10",

(B) by substituting "$.25" for "$.55",

(C) by substituting "2 percent" for "4.4 percent".

(2) **Temporary Increase termination date.—**For purposes of paragraph (1), the temporary increase termination date is earlier of—

(A) January 1, 2014, or

(B) the first of January 1 after 1981 as of which there is—

(i) no balance of repayable advances made to the Black Lung Disability Trust Fund, and

(ii) no unpaid interest on such advances.

* * *

26 U.S.C. § 4121 (emphasis added).

6. The bulk of the Coal Sales Tax imposed by the government is collected in respect of domestic sales, and export sales of coal account for less than 10% of total U.S. sales of coal.

7. Although the Code has many excise taxes imposed on sales and generally exempts from such taxes articles sold for export, Code Section 4221(a) provides that export sales of coal subject to the Coal Sales Tax shall *not* be subject to that exception.

8. The Coal Sales Tax paid with respect to export sales is assessed each calendar quarter with respect to sales made during that quarter, and is calculated with reference both to the amount of coal to be exported and the export sales price of such product. As such, the Coal Sales Tax is directly related to the export of merchandise, and imposes a direct tax burden on such exports.

9. Accordingly, to the extent applicable to export sales, the Coal Sales Tax violates the Export Clause and is unconstitutional.

10. Since as early as 1978, Plaintiffs listed in ScheduleA have paid the Coal Sales Tax in excess of $50,000.00 with respect to their exports of coal.

AS AND FOR A FIRST CAUSE OF ACTON

11. Paragraphs 1 through 10 are repeated with the same force and effect as if stated fully herein.

12. The Export Clause of the Constitution (Article I, Section 9, Clause 5) states: "No Tax or Duty shall be laid on Articles exported from any State."

13. The Coal Sales Tax imposed under 26 U.S.C.§ 4121, with respect to export sales, is a tax or duty prohibited by the Export Clause, and is therefore unconstitutional and void *ab initio*.

14. Plaintiffs have paid such taxes on exports which were unconstitutionally imposed, and assessed on export sales.

AS AND FOR A SECOND CAUSE OF ACTION

15. Paragraphs 1 through 14 are repeated with the same force and effect as if stated fully herein.

16. The Coal Sales Tax imposed "nder 26 U.S.C. § 4121, with respect to export sales, is a tax or duty prohibited by the Export Clause, and is therefore unconstitutional and void ab initio.

17. The defendant's exaction of the Coal Sales Tax on export sales violates the Fifth Amendment of the United States Constitution which provides that "No person shall . . . be deprived of life, liberty or property, with-

out due process of law; nor shall private property be taken for public use without just compensation."

18. Plaintiffs have paid such taxes on exports which were unconstitutionally imposed, and assessed on export sales.

AS AND FOR A THIRD CAUSE OF ACTON

19. Paragraphs 1 through 18 are repeated with the same force and effect as if stated fully herein.

20. The Coal Sales Tax imposed under 26 U.S.C. § 4121, with respect to export sales, is a tax or duty prohibited by the Export Clause, and is therefore unconstitutional and void *ab initio*.

21. Plaintiffs have paid such taxes on exports which were unconstitutionally imposed, and assessed on export sales. Monies so exacted must be refunded based upon an implied contract with the government for their return.

REQUEST FOR JUDGMENT AND RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment and order against the United States, granting each plaintiff separately and individually the following:

a. On the First Cause of Action: a declaration that the tax laid against Plaintiffs' export sales of coal is an unconstitutional exaction of a tax on exports in violation of the Export Clause of the United States Constitution, and an award of damages consisting of a refund of those Coal Sales Tax payments which

were made by Plaintiffs in connection with exports of coal, together with appropriate interest, costs, and attorney's fees;

b. On the second Cause of Action: a declaration that the defendant's exaction of the unconstitutional Coal Sales Tax on export sales violates the Fifth Amendment to the United States Constitution, and an award of damages consisting of a refund of those Coal Sales Tax payments which were made by Plaintiffs in connection with exports of coal, together with appropriate interest, costs, and attorney's fees;

c. On the Third Cause of Action: a declaration that the defendant's exaction of the unconstitutional Coal Sales Tax on export sales creates an implied contract with the government for the return of illegally collected monies, and an award of damages consisting of a refund of those Coal Sales Tax payments which were made by Plaintiffs in connection with exports of coal, together with appropriate interest, costs, and attorney's fees, together with such other and further relief as this Court may deem just and proper.

Respectfully Submitted,

COUDERT BROTHERS

By: /s/ STEVEN H. BECKER
STEVEN H. BECKER
Coudert Brothers
Attorneys for Plaintiffs
1114 Avenue of the Americas
New York, NY 10036
Tel: (212) 626-4400

Date: [April 27, 2000]

SCHEDULE A

1. CLINTWOOD ELKHORN MINING COMPANY
2. GATLIFF COAL COMPANY
3. PREMIER ELKHORN COAL COMPANY

APPENDIX G

UNITED STATES COURT OF FEDERAL CLAIMS

ANDALEX RESCOURCES, INC., ET AL., NO. 99-268 T; BLACK ROCK COAL, INC. ET AL., NO. 00-245 T; BLUESTONE COAL CORP., NO. 00-634 T; BUFFALO MINING CO., ET AL., NC 98-414 T; CHISOLM COAL CO., NO. 00-457 T; CLINTWOOD ELKHORN MINING CO., ET AL., NO. 00-249 T; CONCEPT MINING, INC., ET AL., NO. 00-244 T; CONSOL OF KENTUCKY INC., ET AL., NO. 99-299 T; COVENANT COAL CORP., NO. 00-243 T; CYPRUS CUMBERLAND RESOURCES CORP., ET AL., NO. 98-557 T; CYPRUS PLATEAU MINING CORP., ET AL., NO. 98-200 T; EVERGREEN MINING CO., ET AL., NO 01-252 T; HOBET MINING, INC., ET AL., NO. 00-218 T; KNOX CREEK COAL CORP., ET AL., NO. 00-216 T; LEECO, INC., ET AL., NO. 00-248 T; LIGHTNING INC., 00-762 T; MID-VOL LEASING, INC., ET AL., NO. 00-247 T; MOUNTAIN COAL CO., ET AL., 99-301 T; OMAR MINING CO., ET AL., NO. 01-423 T; PACIFIC COAST COAL CO., NO. 00-236 T; PEABODY COAL CO., ET AL., NO. 99-298 T; PEN COAL CORP., ET AL., NO. 00-250 T; POWDER RIVER COAL CO., NO. 01-422 T; RAPOCA ENERGY CO., NO. 00-242 T; RED RIVER COAL CO., INC., NO. 00-246 T; SOUTHERN MINERALS, INC., NO. 00-467 T; TERRY EAGLE LIMITED PARTNERSHIP ET AL., NO. 00-148 T; CYPRUS AMAX COAL CO., ET AL., NOS. 97-68 T, 97-310 T, 97-311 T, 97-317 T, 97-521 T, AND 97-522 T (CONSOLIDATED); AND K & J COAL CO., INC., NO. 02-200 T, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

[Filed: Nov. 25, 2002]

DEFENDANT'S PROTECTIVE MOTION FOR PARTIAL DISMISSAL OR FOR PARTIAL SUMMARY JUDGMENT

Before: Judge HODGES.

Under RCFC 12(b)(1), the defendant protectively moves for dismissal of all taxable quarters for which the plaintiffs have failed to file timely refund claims on the ground that this Court lacks jurisdiction of the subject matter. In the alternative, the defendant asks the Court to grant it partial summary judgment under RCFC 56 and to limit the plaintiffs' recovery to the three-year period Congress established in Code § 6511. The defendant expects the Court to deny this motion, perhaps summarily.

Although the Court of Appeals for the Federal Circuit has not yet considered most of the arguments the defendant advances in the accompanying brief, they are at least inconsistent with *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001). The trial attorneys file this motion to preserve their client's arguments for a possible appeal. The Justice Department has not yet decided if it will authorize an appeal.

Respectfully submitted,

/s/ ROBERT N. DOROSIN
ROBERT N. DOROSIN
Attorney of Record in Nos.
01-422 T, 01-423 T & 02-200 T
U.S. Department of Justice
Tax Division
Court of Federal Claims
Section
Post Office Box 26
Ben Franklin Station
Washington, DC 20044
Voice: (202) 307-6495
FAX: (202) 514-9440

/s/ ROBERT STODDART
ROBERT STODDART
Attorney of Record in
the Other Cases
U.S. Department of Justice
Tax Division
Court of Federal Claims
Section
Post Office Box 26
Ben Franklin Station
Washington, DC 20044
Voice: (202) 307-6447
FAX: (202) 514-9440

EILEEN J. O'CONNER
Assistant Attorney General
MILDRED L. SEIDMAN
Chief, Court of Federal Claims Section

/s/ MILDRED L. SEIDMAN
MILDRED L. SEIDMAN
Of Counsel

Nov. 25, 2002

APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, Section 9, Clause 5 of the United States Constitution (the Export Clause) provides:

> No Tax or Duty shall be laid on Articles exported from any State.

2. Section 6511 of Title 26 of the United States Code provides, in relevant part:

Limitations on credit or refund

(a) Period of limitation on filing claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) Limitation on allowance of credits and refunds

(1) Filing of claim within prescribed period

No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

* * * * *

3. Section 6532 of Title 26 of the United States Code provides, in relevant part:

Periods of limitation on suits

(a) Suits by taxpayers for refund

(1) General rule

No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of time

The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

* * * * *

4. Section 7422 of Title 26 of the United States Code provides, in relevant part:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax

alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * * * *

5. Section 1346 of Title 28 of the United States Code provides, in relevant part:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * * *

6. Section 1491 of Title 28 of the United States Code provides, in relevant part:

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the

Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

* * * * *

7. Section 2411 of Title 28 of the United States Code provides:

Interest

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

8. Section 2501 of Title 28 of the United States Code provides, in relevant part:

Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * * * *

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No. 07-308

IN THE

Supreme Court of the United States

United States of America,
Petitioner,

v.

Clintwood Elkhorn Mining Company, Et Al.
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Steven H. Becker
Paul A. Horowitz
Suzanne I. Offerman
BAKER & MCKENZIE, LLP
1114 Avenue of the
Americas
New York, NY 10036
(212) 626-4100

Patricia A. Millett
(Counsel of Record)
Thomas C. Goldstein
AKIN GUMP STRAUSS
HAUER & FELD, LLP
1333 New Hampshire Ave.,
NW
Washington, DC 20036
(202) 887-4000

November 2, 2007

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IN THE

Supreme Court of the United States

No. 07-308

UNITED STATES OF AMERICA, PETITIONER

v.

CLINTWOOD ELKHORN MINING COMPANY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

1. a. The Export Clause of the Constitution directs that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, cl. 5. For more than a century, this Court has made "clear that the Export Clause strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." *United States* v. *International Bus. Machines Corp.*, 517 U.S. 843, 848 (1996); see *United States* v. *U.S. Shoe Corp.*, 523 U.S. 360, 367 (1998) ("[T]he Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit."); *Fairbank* v. *United States*, 181 U.S. 283 (1901) (invalidating federal stamp tax on bills of lading for export goods).

Consistent with that constitutional command, Congress has broadly exempted export sales from federal taxation. See 26 U.S.C. 4221(a)(2). In 1978, however, Congress departed from that historic tradition and levied a tax that, *inter alia*, expressly taxed exports of coal from United States mines. See Pub. L. No. 95-277, § 2(a), 92 Stat. 11 (1978); see also 26 U.S.C. 4121(a); 26 U.S.C. 4221 (excluding the tax imposed under Section 4121 from the general tax exception for exports).

More than a decade ago, domestic companies that export coal from the United States challenged the constitutionality of the export tax. In response to those claims, "the government [did] not provide[] * * * any basis" for defending the tax as constitutional, *Ranger Fuel Corp.* v. *United States*, 33 F. Supp. 2d 466, 469 (E.D. Va. 1998), and when the tax was promptly declared unconstitutional, the government did not appeal, Pet. App. 2a. The Internal Revenue Service then formally acquiesced in the invalidation of the tax on exports. See Notice 2000-28, 2000-1 Cum. Bull. 1116 (May 22, 2000).

b. Seven years ago, in *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001), the Federal Circuit addressed the remedies available to coal exporters and held that the government's violation of the Export Clause gives rise to a claim for money damages under the Constitution itself. The court of appeals reasoned that "[t]he necessary implication of the Export Clause's unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted," and that "the language of the Export Clause leads to the ineluctable conclusion that the clause

provides a cause of action with a monetary remedy." *Id.* at 1373; see *id.* at 1374.

The Federal Circuit further held that, like the Judicial Compensation Clause, U.S. Const. Art. III, § 1, and the Just Compensation Clause of the Fifth Amendment, the Export Clause not only "mandat[es] compensation by the Federal Government," but also is a "self-executing" right that permits injured parties to recover the money wrongfully exacted in an action directly under the Constitution itself. *Cyprus Amax*, 205 F.3d at 1372-1373. The court stressed, however, that there are constraints on such suits. In particular, suits for damages under the Export Clause are limited by the Tucker Act's six-year statute of limitations on damages claims against the federal government, 28 U.S.C. 2501. See 205 F.3d at 1372; see also *Venture Coal Sales Co.* v. *United States*, 370 F.3d 1102, 1104-1105 (Fed. Cir.), cert. denied, 543 U.S. 1020 (2004). In so holding, the court in *Cyprus Amax* rejected the government's assertion that coal producers were required to pursue their damages claims under the Internal Revenue Code's tax refund scheme. 205 F.3d at 1374.[1]

The United States sought this Court's review of the Federal Circuit's ruling. This Court, however,

---

[1] Under 26 U.S.C. 7422(a), taxpayers must file an administrative claim with the IRS before filing suit to recover "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." That administrative claim must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever occurs later. 26 U.S.C. 6511(a).

denied the petition for a writ of certiorari in 2001. 532 U.S. 1065.

2. In compliance with 26 U.S.C. 4121, Clintwood Elkhorn Mining Company, Gatliff Coal Company, and Premier Elkhorn Coal Company (collectively, "the Companies") paid taxes on their export sales of coal through 1999. Pet. App. 3a, 9a, 36a. In April 2000, the Companies filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a), seeking damages in the amount of the export taxes paid over the previous six years. See Pet. App. 2a, 31a. The complaint also sought interest under 28 U.S.C. 2411 for their overpayment "in respect of any internal revenue tax."[2] With respect to damages for the three-year period immediately preceding the lawsuit (1997-1999), the Companies had also filed administrative refund claims, pursuant to 26 U.S.C. 6511(a). The government paid the Companies in full with interest for the taxes paid from 1997 through 1999, but has opposed compensating the Companies for their losses from 1994 through 1996. See Pet. 4; Pet. App. 3a.

The Court of Federal Claims held that the Companies were entitled to damages in the amount of the excise taxes paid during the six-year period from 1994 through 1999, and not just for the three-year period covered by the administrative claims. Pet. App. 7a-9a, 11a-28a. The court held that the Companies' claim to compensation under the Tucker Act was controlled by the Federal Circuit's earlier

---

[2] Section 2411 of Title 28 provides for the payment of interest on "any judgment of any court" rendered for any "overpayment in respect of any internal-revenue tax."

decision permitting such claims in *Cyprus Amax*. *Id.* at 14a. The court held, however, that the Companies were not entitled to interest. *Id.* at 14a-28a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-6a. The court first declined to revisit its holding in *Cyprus Amax* that the Export Clause gives rise to a claim for money damages under the Tucker Act, explaining that the issue "was fully aired at the time of *Cyprus Amax*, which "was decided by a unanimous panel, was denied rehearing and rehearing *en banc*, and the government's petition for a writ of certiorari was denied." Pet. App. 3a. The court could "discern no basis for reopening this question." *Ibid.*

The court then held that the Companies were entitled to interest on their damages claim as well, pursuant to 28 U.S.C. 2411. The court held that Section 2411 "is a straightforward recognition that the government should pay for its use of a taxpayer's money to which the government was not entitled." Pet. App. 5a. With respect to the petitioner's argument that interest was only available for claims pursued through the administrative tax refund scheme, the court held that the "straightforward" text of Section 2411 precluded adoption of "[s]uch a convoluted threshold" to the recovery of interest. *Ibid.* The court emphasized that Section 2411 authorizes the payment of interest on "any judgment" of "any court" for "any overpayment" that is "in respect of" an internal revenue tax, and, further, that this Court had held there was "no basis for making ['overpayment'] into a word of art." *Id.* at 6a (quoting *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 532 (1947)).

ARGUMENT

The petition for a writ of certiorari seeks this Court's review of an infrequently arising statute-of-limitations question that this Court has already declined to review once before. The only things that have changed since the Court last denied certiorari are that (i) the filing of any new claims has been barred due to the passage of time, (ii) the number of pending cases raising the issue has declined even further as cases have been resolved in the intervening six years, (iii) the number of cases presenting the issue is even closer to dissipating completely, and (iv) petitioner's prognostication of dire consequences arising from the court of appeals' decision has proven to be unfounded. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner principally seeks this Court's review (Pet. 8-22) of the Federal Circuit's holding that a party can recover damages for a violation of the Export Clause in litigation under the Tucker Act, rather than through an administrative tax refund proceeding. That claim did not merit this Court's review six years ago, see *United States* v. *Cyprus Amax Coal Co.*, 532 U.S. 1065 (2001) (No. 00-360), and it is even less worthy of an exercise of this Court's certiorari jurisdiction now.

First, the question whether a violation of the Export Clause should be vindicated through a damages claim under the Tucker Act or through the Internal Revenue Code's administrative procedure almost never arises. Congress has broadly excluded exports from excise taxes on sales under the Internal Revenue Code. 26 U.S.C. 4221(a)(2). The sole exception to Section 4221's proscription on export

taxes has been the coal tax at issue here. See *ibid.*[3] That coal tax was held unconstitutional almost a decade ago, and has not been enforced by the government since then.

Second, export sales of coal account for less than 10% of the total sales of coal by United States companies. Pet. App. 35a. Accordingly, the number of damages claims that were more than three years old, but less than six years old, arising from the unconstitutional tax on coal exports – the only body of claims affected by the question presented – was already limited when this Court denied certiorari in 2001.[4] The filing of any new claims has now been barred by the Tucker Act's statute of limitations. Moreover, numerous cases have been resolved in the decade since the tax was held unconstitutional and in the six years since *Cyprus Amax*. As a consequence, the practical relevance of the question presented has done nothing but diminish since this Court denied certiorari in 2001.

Third, the question has little prospect of recurring. Historically, congressional efforts to impose taxes on exports have been few and far between. Petitioner identifies no other tax law that might even arguably implicate the question whether the administrative tax refund scheme is the sole

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[3] Under Section 4221(a), vaccines are exempt from export taxes as long as certain IRS regulations are satisfied. See 26 C.F.R. 48.4221-3(e). Section 4221(a) does not provide fuels with an export tax exemption, but IRS regulations do. See 26 C.F.R. 48.4081-3(f)(2).

[4] The *Cyprus Amax* case itself involved claims filed by almost 40 coal companies. See 00-360 Pet. ii-iv.

avenue for relief from an unconstitutional tax on exports. Nor should this Court predicate an exercise of its certiorari jurisdiction on the assumption that Congress would again attempt to impose an unconstitutional tax on exports. Cf. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution"). And even were such a law to be enacted in the future, the question presented here would only arise in the unlikely event that the legislation was declared unconstitutional and the damages claims were filed more than three, but less than six, years after the taxes were paid. The remoteness of that scenario makes an exercise of this Court's certiorari jurisdiction unwarranted.

Petitioner argues (Pet. 25) that the issue will recur because the court of appeals' holding allegedly creates a "large loophole" in the tax remedial scheme, and that "any tax alleged to violate a provision of the Constitution would be a potential candidate for an independent action." The problem with that argument is that, were there such a loophole, it would have been created not by the court of appeals' decision here, which simply reaffirmed *Cyprus Amax*, but by the court's decision seven years ago in *Cyprus Amax*, which first recognized a cause of action under the Export Clause. Indeed, the petition in this case simply repeats the same arguments about the implications of the court of appeals' decision that petitioner advanced in *Cyprus Amax*.[5] Those

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[5] Compare Pet. 25 (warning that the Federal Circuit's national jurisdiction will give rise to claims under any provision

arguments did not warrant certiorari then, see 532 U.S. 1065 (No. 00-360), and they do not warrant review now. Quite the opposite, the passage of substantial time, during which none of petitioner's dire predictions have been borne out, empties their arguments of any force they might once have had. Petitioner cites no intervening decision of the Federal Circuit expanding *Cyprus Amax* to claims arising under different constitutional provisions or to any other effort to bypass the Internal Revenue Code's administrative tax scheme. To the contrary, in the seven years since the Federal Circuit decided *Cyprus Amax* – and in the six years since the government made the same mistaken predictions in its petition for certiorari – the court of appeals has repeatedly refused to extend the *Cyprus Amax* decision. See, *e.g.*, *Ontario Power Generation, Inc.* v. *United States*, 369 F.3d 1298, 1302-1303 (Fed. Cir. 2004) (purchasers of coal may not bring claims under the Tucker Act or the Export Clause to recoup export taxes that were paid by the seller but allegedly passed through to them); see also *Forest Prods. Northwest, Inc.* v. *United States*, 453 F.3d 1355, 1359-1360 (Fed. Cir. 2006) (claim for refund of countervailing duties cannot be brought in the Court of Federal Claims under the Tucker Act); *McCormac* v. *United States Dep't of Treasury*, 185 Fed. Appx. 954, 955-956 (Fed. Cir. 2006) (Court of Federal

---

of the Constitution and will fatally impair the administration of tax laws), with 00-360 Pet. 14 n.9, *United States* v. *Cyprus Amax Coal Co.* (warning that the Federal Circuit has "abandon[ed], for constitutional claims, the complex system of tax administration established by Congress); *id.* at 23 (decision has created "an exception for an entire class of refund suits").

Claims lacks jurisdiction over States' claims to savings bonds held by the U.S. Treasury); *Norman* v. *United States*, 429 F.3d 1081, 1094-1096 (Fed. Cir. 2005) (claim for "illegal exaction" of property arising out of an Appropriations Act falls outside the Court of Federal Claims' Tucker Act jurisdiction), cert. denied, 126 S. Ct. 2288 (2006).[6]

Petitioner also cites no evidence of a flood of taxpayer lawsuits attempting to circumvent the tax refund scheme generally, or even under the Uniformity and Direct Tax Clause scenarios, U.S. Const. Art. I, § 8, cl. 1 and § 9, cl. 4, that the government hypothesizes (Pet. 25). Nor is it apparent that, if such claims ever arose in the future, the Federal Circuit would conclude that those provisions – which are worded differently from the Export Clause and the Judicial and Just Compensation Clauses – even qualify as the type of money-mandating provisions that could give rise to a constitutional claim for damages. See *Cyprus Amax*, 205 F.3d at 1373-1373 (discussing the distinct wording of the few constitutional provisions that have been held to be money-mandating). In fact, having presumably studied the problem for seven years, the *only* evidence the government cites of additional claims arising (Pet. 25) is the residuum of claims under the same long-since invalidated coal tax at issue here. Those leftover cases do not merit this Court's review.

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[6] Cf. *Consolidation Coal Co.* v. *United States*, 351 F.3d 1374, 1379-1381 (Fed. Cir. 2003) (applying *Cyprus Amax* to Export Clause claims).

Fourth, contrary to petitioner's argument (Pet. 10-16), this Court's decisions in *Hinck* v. *United States*, 127 S. Ct. 2011 (2007), and *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763 (2007), do not make the question for which this Court has already denied certiorari any more worthy of review. In *Hinck*, this Court held that the Tax Court provides the exclusive forum for a challenge to the Secretary of the Treasury's decision not to abate interest on an income tax liability. 127 S. Ct. at 2015-2017. The Court stressed that Congress, "in a single sentence," had identified with specific reference to abatement claims, the single forum for their adjudication, the class of eligible plaintiffs, the statute of limitations, the appropriate standard of review, and the authority for judicial relief. *Id.* at 2015. The Court further explained that the exclusivity of the Tax Court forum was underscored by the "past recognition that when Congress enacts a specific remedy when no remedy was previously recognized, * * * the remedy provided is generally regarded as exclusive." *Ibid.*[7]

In *EC Term of Years*, the Court held that a statutory provision establishing a specific nine-month

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[7] *Hinck* – a case in which this Court affirmed the Federal Circuit – also demonstrates that the court of appeals' jurisprudence is in accord with this Court's decisions addressing the coverage of the Tax Code's jurisdictional provisions, so that the remand the government seeks is unwarranted. The Federal Circuit's decision in *Hinck* underscores that, outside the context of the unique constitutional question involved in this case, Federal Circuit law channels tax challenges into the "specific procedure for reviewing IRS determinations" that Congress established for most statutory and constitutional tax challenges. See *Hinck* v. *United States*, 446 F.3d 1307, 1314 (2006).

limitations period for third-parties to challenge tax levies on property precluded pursuit of the same claim through the general tax refund scheme. 127 S. Ct. at 1767-1768. The Court expressed concern that permitting suits under the general tax scheme would impede a procedure "thought essential to the Government's tax collection" efforts. *Ibid.*

Neither of those cases speaks directly to the question presented here. Both *Hinck* and *EC Term of Years* involved choosing between two alternative statutory procedures for enforcing a purely *statutory* claim for relief. This case, by contrast, involves the appropriate mechanism for vindicating a *constitutional* right, and the question whether Congress clearly expressed its intent to foreclose a remedial mechanism created by the Constitution itself, something the Court would not "lightly conclude." *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984); see *id.* at 1012 n.15.

Underscoring the distinct issues raised by displacing constitutional causes of action, this Court's precedents have entertained such constitutional challenges without questioning their jurisdictional footing. See *United States* v. *Hatter*, 532 U.S. 557, 565, 581 (2001) (reviewing challenge brought directly under the Judicial Compensation Clause, U.S. Const. Art. III § 1, to the withholding of Social Security taxes from judicial salaries; neither the United States government, nor the Court, questioned jurisdiction, although it had been litigated in the court of appeals); *United States* v. *U.S. Shoe Corp.*, 523 U.S. 360 (1998) (rejecting argument that Export-Clause challenge to Harbor Maintenance Tax could not be

brought under the Court of International Trade's residual jurisdictional provision).[8]

Beyond that, while the government repeatedly asserts (see, *e.g.*, Pet. 8, 9) that the general administrative tax scheme is the type of "precisely drawn, detailed statute" that should preempt a suit under the Export Clause itself, that conclusion is not self-evident. In fact, that same tax scheme that petitioner advances as narrow and specific was denominated by this Court in *EC Term of Years* to be the very "general remedy" that was preempted by a more claim-specific remedial mechanism. 127 S. Ct. at 1767-1768. Like the challenge to a tax lien in *EC Term of Years* or the interest-waiver in *Hinck*, the Export-Clause-specific cause of action invoked here is also a narrow and targeted avenue for relief that is available only to challenge a single and particular exercise of governmental authority. While the government is correct that the "general tax refund jurisdiction" that it favors, *EC Term of Years*, 127 S. CT. at 1767, comes with a somewhat shorter limitations period, shorter is not the same as "precisely drawn." In fact, the general tax scheme is not precisely targeted to taxes on exports, as the Export Clause cause of action is.

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[8] Nor, given the rapidly diminishing significance of this already obscure procedural question, is there any reason for the Court to override its general reluctance to address constitutional questions unnecessarily. See, *e.g.*, *United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 785 (2007) (declining to address a constitutional question that was not "absolutely necessary to a decision of the case") (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

Furthermore, this Court explained in *EC Term of Years* that enforcement of the shorter limitations period was important there because the challenge to the tax lien would have both delayed and directly impeded the government's "tax collection" efforts. 127 S. Ct. at 1767-1768. This Court has long acknowledged that, with respect to the collection of tax revenues, time is often of the essence. See *Hibbs* v. *Winn*, 542 U.S. 88, 90 (2004) (noting "the Government's need to assess and collect taxes expeditiously"); *South Carolina* v. *Regan*, 465 U.S. 367, 387-388 (1984) (O'Connor, J., concurring in the judgment) (stressing the courts' reluctance to "interfere with the process of collecting the taxes on which the government depends for its continued existence"). Here, by contrast, there is far less reason to assume congressional displacement of the Export Clause claim because respondents seek only an after-the-fact recovery of a small portion of all of the unconstitutional taxes collected by the government over decades under a tax provision for which the government ultimately offered no constitutional defense.

Finally, petitioner argues that the court of appeals' decision conflicts with older decisions of this Court. Pet. 16-24 (citing, *e.g.*, *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447 (1941); *United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906)). That is identical to the argument the government made seven years ago in its petition in the *Cyprus Amax* case, see 00-360 Pet. 20-22 (citing *Kreider*, *supra*, and *Cuba Mail*, *supra*). It did not warrant an exercise of this Court's certiorari

jurisdiction then, and it warrants no different outcome now.

2. Petitioner also seeks this Court's review (Pet. 22-24) of the court of appeals' award of interest on respondents' damages recovery pursuant to 28 U.S.C. 2411. Because the court's decision to permit a damages award itself does not merit this Court's review, neither does this ancillary aspect of that same judgment. Again, this question infrequently arises – indeed, the petition identifies no other decision by any court that has ever addressed the question whether Section 2411 requires in a Tucker Act case the inclusion of interest in a damages claims under the Export Clause. Nor is the question likely to recur with any frequency, given the limited number of challenges remaining to the long-since invalidated tax on coal exports.

Beyond that, the government's argument that Congress limited interest payments to awards made through the tax refund scheme is belied by the plain text of 28 U.S.C. 2411. That provision, which notably is not housed in the Internal Revenue Code and was not enacted as part of the tax refund provisions in Title 26, directs that "interest shall be allowed" on "*any* judgment of *any* court * * * for *any* overpayment *in respect of* any internal-revenue tax." (Emphases added.) Not only does that text not confine interest to awards entered under the specific internal revenue code provisions on which the government relies, the text, in fact, expressly envisions the entry of judgments by a variety of courts against a variety of defendants ("whether against the United States or" internal revenue officials, 28 U.S.C. 2411) for any type of overpayment that may be made and that

could be characterized as "in respect of" internal revenue taxes.[9] Thus, the court of appeals' decision was faithful to the straightforward text of Section 2411. Given the rarity with which the issue arises, there is no need for this Court to grant review simply to confirm that the statute means what it says.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Steven H. Becker
Paul A. Horowitz
Suzanne I. Offerman
BAKER & MCKENZIE, LLP
1114 Avenue of the Americas
New York, NY 10036
(212) 626-4100

Patricia A. Millett
(Counsel of Record)
Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER, & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

November 2, 2007

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[9] This Court, moreover, has stressed that the term "overpayment" should be construed capaciously and not as "a word of art." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 532 (1947).

No. 07-308

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLINTWOOD ELKHORN MINING COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The question here is not whether the underlying tax is constitutional under the Export Clause or whether taxpayers may pursue timely claims for refund of unconstitutionally collected taxes. Cf. Br. in Opp. 1-2. The question instead is whether the comprehensive, carefully-reticulated remedial scheme created by Congress to govern claims for refunds of erroneously or illegally collected taxes is exclusive of the more generous statutory remedial scheme in the general provisions of the Tucker Act. The Federal Circuit, by allowing respondents to pursue monetary claims using the Tucker Act's general six-year statute of limitations, permitted respondents to circumvent the restrictions that Congress imposed on the United States' waiver of sovereign immunity from suits to recover overpayments of tax. The court of appeals allowed respondents not only to evade the tax-refund remedy's mandatory administrative-claims process and shorter statute of limitations, but also to bene-

fit from one portion of that remedy—the allowance of interest—despite their failure to comply with the requirements of Congress's carefully-reticulated remedial scheme. That holding cannot be squared with this Court's precedents. See, *e.g.*, *Hinck* v. *United States*, 127 S. Ct. 2011 (2007); *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763 (2007); *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941); *United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906).

Rather than make any serious attempt to defend the correctness of the judgment below, respondents devote the bulk of their response to the contention that this case is not worthy of this Court's review. As explained in the petition (Pet. 24-26), and as further explicated below, respondents are mistaken. The United States faces substantial liability in this case and numerous similar cases due to the Federal Circuit's failure to follow this Court's precedents. And, contrary to respondents' suggestion (*e.g.*, Br. in Opp. 6), the effect of the Federal Circuit's error is not limited to the specific context here.

The Court need not grant plenary review at this juncture, however, because the Federal Circuit issued its decision without the benefit of this Court's analysis in *Hinck* and *EC Term of Years*. As the petition explains (Pet. 8-16), the decision below is irreconcilable with the rule of law stated (and applied to the tax context) in those cases, namely, that "in most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies.'" *Hinck*, 127 S. Ct. at 2015 (quoting *EC Term of Years*, 127 S. Ct. at 1767). Accordingly, it would be appropriate to vacate the judgment and remand for reconsideration in light of those decisions.

I. THE DECISION BELOW IS IRRECONCILABLE WITH THIS COURT'S PRECEDENTS, INCLUDING THE INTERVENING DECISIONS IN *HINCK* AND *EC TERM OF YEARS*

A. 1. Respondents contend that *Hinck* and *E.C. Term of Years* do not "speak[] directly to the question presented here." Br. in Opp. 12. Short of answering the precise question presented, however, it is difficult to see how those cases could be more on point. In both of those cases, as here, the plaintiffs sought to evade the statutory restrictions that Congress placed in the Internal Revenue Code on the ability to sue the United States. In both cases, as here, the plaintiffs sought to resort to the relatively more generous terms of the Tucker Act. *Hinck*, 127 S. Ct. at 2016; *EC Term of Years*, 127 S. Ct. at 1767. And, in both cases, this Court rejected those attempts based on the governing legal principle that the Federal Circuit failed to apply here: when Congress has created a comprehensive remedial scheme addressed to the plaintiff's situation, the plaintiff cannot circumvent the restrictions on that remedy by resorting to general (and more generous) remedial provisions.

In *EC Term of Years*, this Court rejected a party's attempt to resort to the longer statute of limitations available under the Tucker Act to challenge a government tax levy. 127 S. Ct. at 1766-1767 & n.2. The Court reasoned that such parties must pursue their claims under the wrongful-levy statute, 26 U.S.C. 7426; otherwise, such plaintiffs "could effortlessly evade the levy statute's 9-month limitations period." 127 S. Ct. at 1767-1768. Similarly, in *Hinck*, this Court rejected an attempt by a taxpayer to avoid Congress's limitations on judicial challenges to the IRS's refusal to abate interest, 26 U.S.C. 6404(h) (Supp. IV 2004), by resorting to the general provisions of the Tucker Act. 127 S. Ct. at 2014-2018; see Pet. 9-10. In so concluding, the

Court held that the taxpayer could not rely on one portion of the specific remedial scheme—the standard of review—while avoiding the "limiting features" that Congress placed on that remedial scheme, including a shorter statute of limitations. 127 S. Ct. at 2015.

Here, the court of appeals sanctioned precisely the sort of circumvention condemned by this Court in *EC Term of Years* and *Hinck*. It allowed respondents to pursue their monetary claims for a tax "refund" (Pet. App. 37a-38a)—including interest on their "overpayment" of tax—under the general provisions of the Tucker Act, rather than the comprehensive, and carefully-reticulated, remedial provisions for tax-refund claims. See *id.* at 2a-6a. The court of appeals thereby allowed respondents to evade the Internal Revenue Code's mandatory administrative-claim requirement, which provides that "[*n*]*o suit* or proceeding shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with" the IRS. 26 U.S.C. 7422(a) (emphases added); see Pet. 10-16. The court also permitted respondents to circumvent the relatively shorter, and detailed, time limitations set forth for administrative-refund claims and subsequent judicial proceedings. See 26 U.S.C. 6511(a) and (b), 6532(a)(1) and (2).

Moreover, the court permitted the kind of picking and choosing condemned in *Hinck* by allowing respondents to collect interest available only under the tax-refund remedy, while avoiding the limitations on that remedy. Thus, the decision below went beyond the Federal Circuit's erroneous holding in *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001). The court allowed respondents "to isolate one feature of th[e] 'precisely drawn, detailed'" tax-refund remedial scheme—

the allowance of interest—without requiring them to comply with the limitations of that scheme, notwithstanding that "Congress plainly envisioned [the remedy] as a package deal." *Hinck*, 127 S. Ct. at 2016.[1]

2. Respondents attempt to distinguish *Hinck* and *EC Term of Years*, asserting that those cases "involved choosing between two alternative statutory procedures for enforcing a purely *statutory* claim for relief," whereas respondents sought to "vindicat[e] a *constitutional* right." Br. in Opp. 12. But, notwithstanding the constitutional origins of respondents' claims, this case presents a choice "between two alternative statutory procedures"—the comprehensive remedy created by the tax-refund provisions (with its benefits and restrictions) versus the general grant of jurisdiction under the Tucker Act (with its longer statute of limitations).[2] Contrary to respondents' assertion (*ibid.*), the tax-refund remedy does not "displac[e] any constitutional causes of action." Rather, the tax-refund remedy establishes procedural prerequisites to federal-court jurisdiction over *any* cause of action—whatever its source—for the refund of "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." 26 U.S.C.

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[1] Contrary to respondents' assertion (Br. in Opp. 15-16), the plain text of the statute does not authorize interest on awards of money damages generally, but only on "*overpayment[s]* in respect of any internal-revenue tax." 28 U.S.C. 2411 (emphasis added).

[2] Respondents are incorrect in suggesting (Br. in Opp. 13) that the only difference between the two remedial schemes is "a somewhat shorter limitations period"; respondents' preferred remedy also permits them to evade the entire administrative-claims procedure carefully crafted by Congress. See Pet. 10-12. In any event, a "shorter limitations period" is no small matter in determining whether Congress intended a particular remedy to be exclusive. See *EC Term of Years*, 127 S. Ct. at 1767; see also *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 122-123 (2005).

7422(a); see 26 U.S.C. 6511(a) and (b), 6532(a)(1) and (2). The tax-refund remedy, moreover, is fully applicable to constitutional claims. *E.g.*, *United States* v. *IBM*, 517 U.S. 843 (1996) (Export Clause challenge). Indeed, respondents' successful claims for refunds (with interest) for the tax years in which they did file timely administrative-refund claims demonstrate that the tax-refund remedy is available for the type of claims here. Pet. App. 4a.[3]

If anything, the fact that respondents' underlying claim for relief is a constitutional one further undercuts their position. The question is not whether Congress intended to "foreclose a remedial mechanism created by the Constitution itself." Br. in Opp. 12. The question is instead whether the Federal Circuit should have recognized an implied right of action directly under the Constitution when Congress had already created a comprehensive scheme to vindicate that constitutional right. This Court held in *Bush* v. *Lucas*, 462 U.S. 367 (1983), that the answer to that question is no, even if the specific remedy is "not as effective" as one directly under the Constitution might be. *Id.* at 372. Respondents do not cite, much less attempt to distinguish, that decision.

Respondents (Br. in Opp. 12) point to *Smith* v. *Robinson*, 468 U.S. 992 (1984), but that case merely confirms that the decision below is erroneous. In *Smith*, this Court held, "[i]n light of the comprehensive nature of the procedures and guarantees" in the Education of the Handicapped Act, including its administrative-review process, *id.* at 1011, that a plaintiff could not circumvent that "carefully tailored scheme," *id.* at 1012, by bringing a constitutional claim un-

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[3] Respondents are thus incorrect in suggesting (Br. in Opp. 13) that the Export Clause is the appropriate comparison in deciding what is the more "targeted" remedy.

der the general provisions of 42 U.S.C. 1983. See *Smith*, 468 U.S. at 1010-1013.

Moreover, respondents' reliance (Br. in Opp. 12) on *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), is misplaced. In *United States Shoe*, this Court affirmed the Court of International Trade's jurisdiction to hear a tax-refund suit attacking the constitutionality of the Harbor Maintenance Tax. *Id.* at 365-366. But the usual prerequisites for tax-refund actions were expressly inapplicable to the specific statutory provisions at issue there. See 26 U.S.C. 4462(f)(3) (providing that the Harbor Maintenance Tax "shall not be treated as a tax for purposes of subtitle F [which includes 26 U.S.C. 6511, 6532, and 7422] or any other provision of law relating to the administration and enforcement of internal revenue taxes"). *United States Shoe* thus provides no support for the decision below.

Respondents' reliance on *United States* v. *Hatter*, 532 U.S. 557 (2001), fares no better. As respondents acknowledge (Br. in Opp. 12), this Court did not consider whether the tax-refund remedial scheme was the exclusive remedy for the claim in that case, which involved whether the imposition of certain Medicare and social security taxes on Article III judges unconstitutionally diminished their salaries. *Hatter*, 532 U.S. at 561, 564. Moreover, in stark contrast to this case, the Federal Circuit concluded in *Hatter* that the plaintiffs did "not seek tax refunds, but compensation to ensure compliance with Article III, § 1." *Hatter* v. *United States*, 953 F.2d 626, 630 (Fed. Cir. 1992). Here, the complaint expressly sought "damages consisting of a refund" (Pet. App. 37a-38a); the court of appeals characterized respondents' relief as a "repayment" and "recovery" of their taxes (*id.* at 1a-2a); and the court awarded interest "on the refunded export taxes" on the theory that the judgment was "for" an "overpayment" of tax (*id.* at 6a).

B. Respondents implicitly concede that the decision below cannot be reconciled with this Court's decisions in *A.S. Kreider* and *New York & Cuba Mail*. As demonstrated in the petition (Pet. 19), *New York & Cuba Mail* holds that a taxpayer seeking to bring an Export Clause claim cannot evade a prerequisite to a tax-refund suit by relying on the general jurisdictional provisions of the Tucker Act. 200 U.S. at 494-495. But that is precisely what the Federal Circuit has sanctioned here. Similarly, in *A.S. Kreider*, this Court held that a taxpayer could not circumvent the shorter limitation period for tax-refund actions by relying on the "outside limit" expressed in the Tucker Act's general six-year limitation period. 313 U.S. at 447. The current six-year limitation (28 U.S.C. 2501) is similarly worded as an "outside limit"—an assertion respondents do not contest—yet the Federal Circuit impermissibly allowed respondents to rely on that outer limit. See Pet. 21.

Rather than attempt to defend the Federal Circuit's decision in the face of *A.S. Kreider* and *New York & Cuba Mail*, respondents suggest (Br. in Opp. 14-15) that the Court should deny certiorari because it declined to review the Federal Circuit's earlier decision in *Cyprus Amax*. But unreviewed Federal Circuit decisions do not lessen the force of this Court's precedents. At a minimum, respondents' argument provides no reason not to vacate and remand in light of last Term's intervening decisions. In addition, that argument fails to acknowledge that, relative to *Cyprus Amax*, the decision below represents an even greater divergence from this Court's precedents, because the court of appeals has compounded its error by allowing respondents to recover interest on their "overpayment" of "tax" (Pet. App. 6a), while still maintaining (*id.* at 2a-3a) that this is not a "suit" for the "recovery of any internal

revenue tax" subject to the exclusive tax-refund remedial scheme. 26 U.S.C. 7422(a).

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS ACTION BY THIS COURT

Respondents assert (Br. in Opp. 6) that whether a violation of the Export Clause should be vindicated through the general provisions of the Tucker Act, rather than the specific provisions of the Internal Revenue Code, "almost never arises." But that is because, before the Federal Circuit's decision in *Cyprus Amax*, no prudent taxpayer would have risked failing to obey the jurisdictional prerequisites of the Internal Revenue Code. Following the decision below, the door is open not only to untimely tax-refund claims that can be framed as constitutional claims, but also to an award of interest on such claims, even if the taxpayer fails to file a timely administrative-refund claim.

Contrary to respondents' assertions (Br. in Opp. 6-10), the court of appeals' failure to apply the "well-established principle that, in most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies,'" *Hinck*, 127 S. Ct. at 2015, is having significant negative repercussions, and not simply in cases presenting the precise issue here. As noted in the petition (Pet. 25), this case is one of many presenting the same issue, in which the United States faces untimely refund claims totaling tens of millions of dollars.[4] And, contrary to respondents' suggestion that no new such suits can now be filed (*e.g.*, Br. in Opp. 6), a coal producer filed such a suit on January 30, 2007. See *Kanawha Eagle Coal, LLC* v. *United States*, No. 07-74 T (Fed. Cl.).

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[4] Although the petition asserted (Pet. 7, 25) that there were "more than" 25 other cases, the government has concluded upon further review that there are exactly 25 other cases, all of which remain pending in the courts below.

Moreover, this is not the only context in which the Federal Circuit has made the same error. In *Consolidation Coal Co.* v. *United States*, 351 F.3d 1374 (Fed. Cir. 2003), the Federal Circuit relied on its decision in *Cyprus Amax* to allow plaintiffs to resort to the Tucker Act's general jurisdictional provisions to recover reclamation fees paid to the United States pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA). *Id.* at 1378-1381. The plaintiffs alleged that the reclamation-fee regulation promulgated by the Department of Interior violated the Export Clause. *Id.* at 1378-1379. The Federal Circuit allowed that challenge to proceed in the Court of Federal Claims, despite language in the statute expressly providing that "'[a]ny action by the Secretary promulgating national rules or regulations [under the SMCRA] shall be subject to judicial review in the United States District Court for the District of Columbia,' and that '[a] petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action.'" *Id.* at 1381 (quoting 30 U.S.C. 1276(a)(1)). Nearly ten similar cases are now proceeding in the courts below under the authority of *Consolidation Coal.*

Consolidation Coal is imbued with the same mistaken reasoning as the decision below, and refutes respondents' suggestion that the issue here is a contained one of only diminishing future significance.[5] The holdings of the Federal Circuit below and in *Cyprus Amax* are patently incorrect, irreconcilable with intervening precedents of this

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[5] Although respondents assert (Br. in Opp. 9-10) that the Federal Circuit has "repeatedly refused to extend the *Cyprus Amax* decision," none of the four cases they cite expressly rejects an argument for the extension of *Cyprus Amax*, and *Consolidation Coal* is just such an extension.

Court, and of recurring importance in ongoing litigation. Further review is warranted.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *EC Term of Years* and *Hinck*. In the alternative, the Court may wish to consider summary reversal, or the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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No. 07-308

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY AND PREMIER ELKHORN COAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

RICHARD T. MORRISON
Acting Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

GILBERT S. ROTHENBERG
Acting Deputy Assistant Attorney General

WILLIAM M. JAY
Assistant to the Solicitor General

KENNETH L. GREENE
STEVEN W. PARKS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a taxpayer who would have been entitled to file a tax-refund action in federal court for a refund of taxes (and interest thereon), but who failed to satisfy a statutory prerequisite to such an action—namely, the filing of a timely administrative refund claim—and is therefore barred from bringing such an action, may nevertheless obtain a refund (and interest thereon) through an action directly under the Constitution pursuant to the Tucker Act, 28 U.S.C. 1491(a).

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In the Supreme Court of the United States

No. 07-308

UNITED STATES OF AMERICA, PETITIONER

v.

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY AND PREMIER ELKHORN COAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 473 F.3d 1373. The opinion of the Court of Federal Claims (Pet. App. 11a-28a) is reported at 54 Fed. Cl. 563.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2007. A petition for rehearing was denied on April 27, 2007 (Pet. App. 29a-30a). On July 17, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 9, 2007, and the petition was filed on September 7, 2007. The petition for a writ of certiorari was granted on December 3, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. a. The Export Clause of the Constitution, Art. I, § 9, Cl. 5, provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." In 2000, the Internal Revenue Service (IRS) acquiesced in a holding by a federal district court that an excise tax on coal (26 U.S.C. 4121(a)) violated the Export Clause, as applied to sales of coal that were in the stream of export and subsequently exported. See Pet. App. 2a. In its acquiescence, the IRS stated that the tax would no longer be imposed on sales of coal that meet those criteria, and that the IRS would refund taxes paid on exported coal if the taxpayer filed a timely administrative claim for refund. See I.R.S. Notice 2000-28, 2000-1 C.B. 1116; Pet. App. 12a.

Section 7422(a) of the Internal Revenue Code provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected" unless the taxpayer has "duly filed" with the IRS an administrative claim for a tax refund. 26 U.S.C. 7422(a). Section 6511(a) provides that an administrative "[c]laim for credit or refund of an overpayment of any tax imposed by this [Title 26] * * * shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid," whichever is later. 26 U.S.C. 6511(a). Section 6511(b)(1) further provides that "[n]o credit or refund shall be al-

lowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b)(1). Section 6532(a), in turn, mandates that "[n]o suit or proceeding under section 7422(a) for the recovery of any internal revenue tax * * * shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time," but any refund suit must be begun within two years after the date of the IRS's disallowance of the refund claim, although that period can be extended by agreement. 26 U.S.C. 6532(a)(1) and (2). A refund suit may be brought either in a federal district court or in the Court of Federal Claims. 28 U.S.C. 1346(a)(1).

In addition, 28 U.S.C. 2411 provides in pertinent part that, "[i]n any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment." It further establishes that interest shall run "from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue." *Ibid.*

b. In *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001), the Federal Circuit held that a taxpayer may bring a suit against the United States for money damages directly under the Export Clause, as an "alternative avenue[]" to "a tax refund action"; that such a suit may proceed in the Court of Federal Claims under the Tucker Act, 28

U.S.C. 1491(a); and that such an "alternative" action is "not subject to compliance with the tax refund statute." *Cyprus Amax*, 205 F.3d at 1373-1376. The court reasoned that the "necessary implication of the Export Clause[']s unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted." *Id.* at 1373, 1375. Accordingly, the court held that the Export Clause is "self-executing; that is, * * * a party can recover for payment of taxes under the Export Clause independent of the tax refund statute." *Id.* at 1374. The court further concluded that such a suit was subject to the general six-year limitation period of 28 U.S.C. 2501 for suits under the Tucker Act, rather than the shorter statute of limitations prescribed by 26 U.S.C. 6511(a) for filing a timely administrative "[c]laim for * * * refund of an overpayment of any tax" as a prerequisite to suit. *Cyprus Amax*, 205 F.3d at 1372-1373.

2. Respondents, three coal companies, filed timely administrative claims for refund of coal excise tax they had paid on exported coal during 1997, 1998, and 1999.[1] The IRS refunded those taxes, including interest. Respondents failed, however, to file timely administrative refund claims for $1,065,936 in coal excise tax paid on exported coal in 1994, 1995, and 1996. See Pet. App. 3a-4a, 9a; Resp. C.A. Br. 5. Consequently, the IRS did not refund those taxes. Respondents then filed this suit in the Court of Federal Claims seeking "damages consisting of a refund" of the coal excise tax not already refunded, and "appropriate interest, costs, and attorney's fees." Pet. App. 37a-38a.

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[1] Returns and payments of coal excise taxes are made on a quarterly basis. 26 C.F.R. 40.0-1(a), 40.6011(a)-1.

The Court of Federal Claims, relying on the Federal Circuit's earlier decision in *Cyprus Amax*, allowed respondents to pursue their monetary claims directly under the Export Clause and to avail themselves of the general six-year statute of limitations in the Tucker Act, 28 U.S.C. 2501, notwithstanding their failure to file timely administrative refund claims. Pet. App. 14a. The court, however, denied respondents' request for interest on their claims. *Id.* at 14a-28a. It concluded that respondents could not recover interest under 28 U.S.C. 2411 because, under the reasoning of *Cyprus Amax*, their claims were "for damage under the Export Clause rather than * * * tax refunds pursuant to the Tax Code." Pet. App. 17a. The court rejected respondents' argument that they could "avoid the shorter statute of limitations, and the administrative requirements of the tax refund statutes by using the Export Clause for jurisdiction, while returning to the tax statutes to obtain interest pursuant to § 2411." *Ibid.*[2]

In a subsequent order, the court denied the government's request to dismiss respondents' claims with respect to tax periods as to which respondents failed to file timely administrative refund claims or, in the alternative, to limit respondents' recovery to those claims falling within the three-year limitation period of Section 6511(a). Pet. App. 10a; see *id.* at 41a-42a. The court entered judgment for respondents in the stipulated amount of $1,065,936, without interest. *Id.* at 7a.

3. On cross-appeals, the court of appeals affirmed in part and reversed in part. Pet. App. 1a-6a. Rejecting

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[2] The court also rejected respondents' arguments that the Export Clause and other constitutional provisions mandated the payment of interest. Pet. App. 19a-27a. Respondents abandoned those arguments on appeal.

the government's request for an initial hearing en banc, the court expressly declined to reconsider its decision in *Cyprus Amax*, *id.* at 2a-3a, holding that respondents "could either proceed in court under the Tucker Act, or seek an administrative tax refund under the Tax Code." *Id.* at 3a. The court asserted that "[a] consequence of Tucker Act jurisdiction is that the statute of limitations is six years, 28 U.S.C. § 2501, whereas refund claims brought administratively to the Internal Revenue Service are limited to recovery of overpayments for the preceding three years." Pet. App. 3a (citing 26 U.S.C. 6511(a)). The court therefore held that respondents could seek recovery of the coal excise tax paid in 1994 through 1996, under the longer six-year statute of limitations, even though they had not filed administrative claims for those amounts. *Ibid.*

The court of appeals further held that Section 2411 entitled respondents to recover interest on the coal excise tax paid on exported coal for 1994 through 1996, notwithstanding their failure to file timely administrative claims for those years. Pet. App. 1a, 3a-6a.[3] The court reasoned that Section 2411 "is a straightforward recognition that the government should pay for its use of a taxpayer's money to which the government was not entitled." *Id.* at 5a. And the court concluded that, whether or not respondents had filed an administrative claim, the judgment awarded to them was "for" an "overpayment" of tax within the meaning of Section 2411, and that respondents therefore were entitled to interest "on the refunded export taxes for the entire period of recovery." *Id.* at 6a.

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[3] The court noted that the government did not dispute entitlement to interest for the years 1997 through 1999 "because an administrative claim was filed for those years." Pet. App. 4a.

The government filed a petition for rehearing en banc, which the court denied without noted dissent. Pet. App. 29a-30a.

SUMMARY OF ARGUMENT

Congress created a comprehensive and finely reticulated statutory regime for resolving claims by taxpayers seeking to recover alleged tax overpayments. That all-encompassing tax remedial scheme includes a mandatory administrative claims process, explicit preclusion of judicial relief in the absence of compliance with that administrative process, and uniquely tailored limitation periods both for the administrative remedy and for any subsequent judicial proceedings. Notwithstanding the utter clarity and unmistakable forcefulness with which Congress mandated that "[*n*]o suit or proceeding" for "the recovery of *any* internal revenue tax" shall "be maintained in *any* court" absent compliance with those procedures, 26 U.S.C. 7422(a) (emphases added), the Federal Circuit fashioned an "alternative" judicial remedy with a longer limitation period and without an administrative exhaustion requirement, in patent disregard of the congressional mandate. That error should be corrected, and the judgment of the court of appeals should be reversed.

As expanded by the decision below, the Federal Circuit's "alternative" refund remedy is predicated on three propositions, each of which is essential to the judgment below, and each of which is incorrect. First, the court of appeals erroneously reasoned that the statutory tax-refund mechanism created by Congress does not govern tax challenges pleaded solely under the Tucker Act and the Constitution. Second, the court incorrectly held that the Export Clause provides for a freestanding and self-

executing claim against the United States. And third, the court wrongly concluded that respondents could recover interest under a statute that applies only to claims for an overpayment of taxes, even while proceeding under an "alternative" cause of action that is purportedly separate and distinct from a tax-refund claim. None of those holdings is correct.

1. The court of appeals erred in allowing respondents to maintain their suit for recovery of taxes under the Export Clause without having filed a timely administrative claim for refund. The Internal Revenue Code plainly states that "[n]o suit or proceeding" to recover "any" tax "alleged to have been erroneously or illegally assessed or collected" may be brought "in any court" unless the taxpayer first files a timely refund claim and allows the Secretary of the Treasury a specified time to resolve it. 26 U.S.C. 7422(a); see 26 U.S.C. 6511(a) and (b)(1), 6532(a). That detailed and finely reticulated tax-refund scheme, including the mandatory administrative claims process and the firm, non-tollable limitation period, cannot be circumvented by the expedient of pleading a constitutional claim and asserting jurisdiction under the Tucker Act. Claims for repayment of unlawful tax are subject to the exclusive procedural requirements set out in the tax code, no matter what the source of the alleged illegality—be it regulatory, statutory, or constitutional.

The Federal Circuit's "alternative" remedy is foreclosed by this Court's decision in *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941), which rejected a court of appeals' holding that a tax-refund suit brought under the Tucker Act was subject only to the general six-year statute of limitations applicable to Tucker Act claims rather than the specific five-year statute that then gov-

erned tax-refund suits. Here, the court of appeals committed the same error, applying the Tucker Act's general six-year statute of limitations rather than the shorter statute of limitations and other expressly exclusive procedures specifically applicable to tax-refund suits.

This Court's decision in *United States* v. *New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906), is similarly irreconcilable with the rule of law applied below. In that case, the Court held that an action under the Tucker Act to recover overpayments of a stamp tax that concededly violated the Export Clause had to be dismissed because the taxpayer had failed to make an administrative protest before paying the tax—a protest that, at the time, was a prerequisite to bringing a suit for the recovery of an unlawful tax.

Although the expressly exclusive nature of the tax-refund remedy makes this a particularly straightforward case, the court of appeals' resort to the "alternative" procedures of the Tucker Act cannot be reconciled with cases holding that, even in the absence of such explicit language of exclusivity, a precisely drawn, detailed statute precludes an attempt to resort to more general remedies. See, *e.g.*, *Hinck* v. *United States*, 127 S. Ct. 2011 (2007); *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763 (2007). In both *EC Term of Years* and *Hinck*, the Court rejected attempts by taxpayers to use the Tucker Act's grant of jurisdiction as a basis for evading the limitations imposed by Congress on a specific and directly applicable remedial scheme. In this case, by contrast, the court of appeals erroneously authorized just such an evasion.

2. The clarity of the expressly exclusive language in the tax-refund scheme, and its reinforcement by recent

cases that (even in the *absence* of explicitly exclusive statutory language) precluded resort to a more general Tucker Act remedy, makes the court of appeals' decision difficult to understand. The court appears to have been influenced by the constitutional nature of the claims, but the fact that the taxes collected were unconstitutional under the Export Clause does not justify the creation of a freestanding constitutional remedy or the application of the Tucker Act's more lenient procedural limitations. Nothing in the text of the Export Clause supports the creation of a "self-executing" cause of action, let alone a remedy that can supplant the adequate but limited tax-refund remedy through which Congress has implemented the constitutional guarantee.

Causes of action are not so easily inferred under the Constitution, as this Court has repeatedly warned. Since the decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court has sustained a new damages remedy under the Constitution only twice. It has never inferred such a damages remedy directly against the United States, like the one created by the court of appeals, nor has it ever created a new constitutional cause of action when Congress has already set out an adequate statutory form of redress, as Congress has done here by creating the tax-refund procedure. The court of appeals' recognition of a freestanding and self-executing Export Clause cause of action completely disregards those limitations, and should be rejected.

3. The court of appeals erred not only by allowing respondents to evade the tax-refund remedy's mandatory administrative claims process and shorter statute of limitations, but by turning around and allowing respondents to benefit from one aspect of that remedy that

favors taxpayers—the allowance of interest. The interest provision, 28 U.S.C. 2411, is an integral part of the refund procedure and applies only to judgments "for any overpayment in respect of any internal-revenue tax." The entire tax-refund process—including the refund-claim requirement, the statute of limitations, and the right to recover interest—is a "package deal" constructed by Congress, and the entire process must therefore remain intact. *Hinck*, 127 S. Ct. at 2016. Properly understood, respondents' claims are for recovery of an allegedly overpaid tax; the government therefore correctly paid respondents interest on their timely and valid refund claims, and correctly denied all relief (including interest) that was not requested in a timely refund claim. If, however, as the Federal Circuit reasoned, respondents are *not* asserting tax-refund claims, but instead are pursuing wholly separate and distinct claims for "damages" under the Export Clause, it would necessarily follow that they cannot qualify for an award of interest. Settled principles of sovereign immunity establish that plaintiffs cannot recover interest from the United States without a specific statutory authorization. Respondents cannot claim such authorization from Section 2411, which is expressly limited to claims for tax overpayments, and simultaneously deny that they are pursuing claims for tax overpayments.

ARGUMENT

THE FEDERAL CIRCUIT ERRED IN ALLOWING RESPONDENTS TO CIRCUMVENT THE DETAILED, CAREFULLY CRAFTED STATUTORY SCHEME THAT GOVERNS SUITS FOR THE REFUND OF TAX

The basic statutory question here is straightforward. The tax-refund scheme is expressly exclusive. And even in the absence of such express language, this Court has found targeted and precisely limited remedial schemes to preclude resort to the general provisions of the Tucker Act. Nonetheless, the court of appeals authorized an alternative remedy because the illegality of the taxes that respondents paid stems from the Export Clause. But the constitutional nature of the underlying illegality does not change the statutory analysis. The tax-refund scheme provides the exclusive avenue for recovery of taxes unlawfully collected or assessed—without regard to whether the illegality flows from a regulation, a statute, or the Constitution.

In the absence of any statutory mechanism for recovering taxes assessed in violation of the Export Clause, the courts might have considered permitting an implied remedy, such as the common-law assumpsit action against the tax collector that did service for taxpayers before Congress provided a statutory remedy. See, *e.g.*, *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 150, 156-158 (1836). However, in light of the statutory mechanism for recovering unlawful tax payments—subject to reasonable exhaustion requirements and reasonable limitation periods—there is absolutely no basis for inferring any kind of self-executing constitutional remedy. And there is no more basis for altering the normal rules that determine how exclusive statutory recovery mechanisms in-

terrelate with the Tucker Act. Application of those principles admits of but one answer: the tax-refund scheme is exclusive, and the decision below must be reversed.

A. The Unambiguous Text Of The Internal Revenue Code Precludes Respondents' Untimely Claims For Recovery Of Tax Overpayments

1. Congress created a comprehensive and finely reticulated statutory regime for resolving claims by taxpayers for the recovery of alleged tax overpayments. Under that comprehensive and expressly exclusive tax-refund scheme, an administrative claim for a refund "of *any* tax imposed by * * * [Title 26]" (including the tax at issue here, 26 U.S.C. 4121(a)) "*shall* be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid," whichever is later. 26 U.S.C. 6511(a) (emphases added). The statute further provides that "[*n*]*o* * * * *refund shall be allowed* * * * unless a claim for * * * refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b) (emphasis added). This Court has noted the "unusually emphatic form" and "highly detailed technical manner" in which Section 6511 "sets forth its time limitations." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (refusing to apply equitable tolling to those limitations); accord *John R. Sand & Gravel Co.* v. *United States*, No. 06-1164 (Jan. 8, 2008), slip op. 2-3 (noting that limitations provisions like Section 6511 serve "broader system-related goal[s]," including "facilitating the administration of claims").

In equally emphatic and explicit terms, Section 7422(a) mandates that "[*n*]*o suit* or proceeding shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally

assessed or collected * * * until a claim for refund or credit has been duly filed with" the IRS. 26 U.S.C. 7422(a) (emphases added). Once the requisite administrative claim has been filed, "[n]o suit or proceeding" for refund of the tax may be instituted until the claim has been disallowed, or for six months if the claim is not resolved during that time. 26 U.S.C. 6532(a)(1).

Congress thus spoke with absolute clarity and forcefulness in mandating that the comprehensive tax-refund scheme provide the exclusive mechanism by which taxpayers could recover taxes wrongfully collected by the government. Against that backdrop, the Federal Circuit's creation of an "alternative" judicial remedy—a remedy that offers a longer limitation period than the three years specified by Congress for tax-refund claims, and that evades entirely the administrative claims process mandated by Congress "for the recovery of any internal revenue tax"—simply cannot be justified.

2. The court of appeals permitted respondents to recover erroneously collected coal excise taxes (and associated interest) through an action for "money damages" directly under the Export Clause, characterizing that "damages" action as an "alternative avenue[]" to "a tax refund action" that is "not subject to compliance with the tax refund statute." *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369, 1373, 1375-1376 (Fed. Cir. 2000), cert. denied, 532 U.S. 1065 (2001); see Pet. App. 2a-3a. The court never explained why such a constitutional claim would not fall within the clear, specific, and comprehensive terms of Section 7422(a); that provision covers "any" court and "any" allegedly unlawful tax without regard to the source of the illegality. Instead, the court of appeals simply asserted that *because* the Export Clause purportedly creates a self-executing

cause of action, such claims need not comply with the procedural statutes that otherwise would bar respondents' claims here, and instead are subject to the Tucker Act's general six-year statute of limitations. If the Export Clause claims were truly self-executing to such a degree that they could not be limited by Congress—which they are not, see pp. 29-40, *infra*—there is no reason to think they would be any more constrained by the Tucker Act than by the tax-refund scheme. But, in all events, the specific tax-refund scheme generally governs over the more general Tucker Act provisions, and the constitutional nature of the alleged illegality does not justify a different rule.

a. As discussed, "[*n*]*o* suit" for the recovery of "*any* internal revenue tax alleged to have been erroneously or illegally assessed or collected" may be maintained in "*any*" court unless the Internal Revenue Code's administrative-claim requirements are satisfied. 26 U.S.C. 7422(a) (emphases added). The prayer for relief in respondents' complaint demonstrates that their suit is inherently and necessarily an action to recover illegally collected taxes, not a suit for general damages. Pet. App. 37a-38a (seeking "an award of damages consisting of a refund"). Indeed, the court of appeals accurately characterized respondents' relief as a "repayment" or "recovery of * * * taxes." *Id.* at 1a; accord *id.* at 2a. And Section 7422(a) governs all refund claims for taxes alleged to have been illegally assessed or collected, without regard to the source of the alleged illegality. Cf. *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 759 (1974) (observing that decisions of the Court make "unmistakably clear that the constitutional nature of a taxpayer's claim * * * is of no consequence" for purposes of applying the Anti-Injunction Act, 26 U.S.C.

7421, which bars suits to enjoin assessment or collection of a tax). Section 7422(a) establishes a procedural prerequisite to federal court jurisdiction over "any" cause of action in "any" court for the refund of "any" internal revenue tax, and is therefore fully applicable to claims for recovery of taxes on constitutional grounds. As respondents' successful refund claims for coal excise tax paid in 1997 through 1999 demonstrate, Pet. App. 4a, respondents could have asserted their Export Clause claims through the specific remedial scheme for tax refunds, if they had timely complied with the requirements of that statutory scheme. See *Cyprus Amax*, 205 F.3d at 1372 (recognizing that a taxpayer who "complied with the tax refund statute and filed a tax refund action * * * can pursue the theories underlying its constitutionally-based causes of action through its tax refund action"); see also, *e.g.*, *United States* v. *IBM Corp.*, 517 U.S. 843, 845-846 (1996) (Export Clause challenge in which the taxpayer properly sought a refund before bringing suit).

This Court has already rejected an effort to use the Tucker Act to avoid specific requirements for pursuing tax-refund claims based on the Export Clause. In *United States* v. *New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906), this Court rejected a taxpayer's attempt to litigate an Export Clause claim under the Tucker Act without complying with the procedural prerequisites applicable to tax-refund actions. The taxpayer sought to recover amounts paid for tax stamps on exports, and the government conceded that the stamp tax violated the Export Clause. *Id.* at 490-491. Under the then-applicable procedures, however, protest or notice to the collector at the time of payment was generally necessary if the taxpayer wished to preserve its ability to challenge

an allegedly invalid tax under the tax-refund statutes. See *Chesebrough* v. *United States*, 192 U.S. 253, 259-264 (1904). The taxpayer in *New York & Cuba Mail* had failed to comply with the protest requirement, and accordingly the government argued that its claim was barred. 200 U.S. at 491, 492, 494. In response, the taxpayer sought to invoke an alternative avenue of relief for effectuation of its Export Clause claims under the Tucker Act, pointing to a separate statute authorizing the redemption of tax stamps reflecting amounts that had been "in any manner wrongfully collected." *Id.* at 494-495 (quoting Act of May 12, 1900, ch. 393, § 1, 31 Stat. 178). Notwithstanding that separate statutory avenue for relief, and without regard to the constitutional nature of the taxpayer's claims, the Court held that the normal procedural prerequisites still governed, and accordingly denied relief. 200 U.S. at 495. The same result is required here.[4]

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[4] The Federal Circuit attempted to distinguish *New York & Cuba Mail* on the ground that the taxpayer there proceeded under a tax-refund statute, rather than under the Export Clause directly. *Cyprus Amax*, 205 F.3d at 1375-1376. As the Court's opinion in *New York & Cuba Mail* reflects, however, the taxpayer's claim there was founded both on the Export Clause and on a revenue statute allowing refunds, and the taxpayer argued that it had "a right of action under the Tucker Act." 200 U.S. at 494. If the Federal Circuit's decisions here and in *Cyprus Amax* were correct, the taxpayer in *New York & Cuba Mail* likewise should have been entitled to evade the payment-under-protest requirement. Moreover, the presence of an alternative mechanism to vindicate Export Clause rights is a sufficient reason to reject an effort to infer a cause of action directly from the Export Clause. Pointing to the Export Clause action not only fails to distinguish *New York & Cuba Mail*, but underscores that the constitutional claim seems to have distracted the court of appeals from a statutory question that should have been quite straightforward.

b. The Federal Circuit similarly erred in holding that the Tucker Act's six-year statute of limitations would govern respondents' supposed freestanding claim under the Export Clause. *Cyprus Amax*, 205 F.3d at 1372 (stating that "a different statute of limitations [28 U.S.C. 2501] pertains to the Tucker Act than to the tax refund statutes"); see Pet. App. 2a-3a. As this Court has squarely held, the Tucker Act's general six-year limitation period establishes only "an outside limit on the period within which all suits might be initiated" against the United States. *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447 (1941).

The *A.S. Kreider* Court squarely rejected a similar attempt by a taxpayer to avoid the then-applicable statute of limitations specific to tax-refund actions. See 313 U.S. at 446. In that case, the taxpayer had failed (like respondents here) to file a tax-refund action within the tax-specific limitation period. *Id.* at 445 (citing Revenue Act of 1926, ch. 27, § 1113(a), 44 Stat. 116). The taxpayer sought (again like respondents) to rely upon the longer, six-year statute of limitations in the Tucker Act, which applied generally to "suit[s] against the Government," including but not limited to suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 41(20) (1940).

The Court rejected the taxpayer's attempted end run, reasoning that the shorter and more specific limitation period for tax-refund actions would have "no meaning" if it could be evaded through reliance on the general Tucker Act limitation period. *A.S. Kreider*, 313 U.S. at 448. Observing that the six-year period was phrased merely as an "outside limit" (*i.e.*, as a requirement that "[n]o suit against * * * the United States shall be al-

lowed * * * unless * * * brought within six years" of accrual), the Court held that "nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions." *Id.* at 447 (quoting 28 U.S.C. 41(20) (1940)). In so holding, the Court noted the strong federal policy behind the shorter limitation period: Congress "[r]ecogniz[ed] that suits against the United States for the recovery of taxes impeded effective administration of the revenue laws." *Ibid.*

The current version of the six-year limitation period is likewise phrased as an "outside limit," mandating that "[e]very claim * * * shall be barred unless * * * filed within six years." 28 U.S.C. 2501. *A.S. Kreider* therefore forecloses the court of appeals' holding that respondents are subject only to the general six-year limitation period and not the shorter and more specific regime applicable to tax-refund claims.

Indeed, were the rule otherwise, *every* tax-refund claim brought in the Court of Federal Claims could potentially invoke the more generous six-year statute of limitations. Section 2501 currently applies to "[e]very claim of which the United States Court of Federal Claims has jurisdiction," a category that includes tax-refund claims founded solely on the Internal Revenue Code rather than on the Constitution. It is undisputed, however, that in such cases the taxpayer may not rely on the six-year "outside limit" for Tucker Act claims generally, but is instead subject to the more specific and less generous provisions of 26 U.S.C. 6511(a), 6532(a)(1), and 7422(a). Nothing in the Tucker Act statute of limitations distinguishes constitutional from statutory claims or otherwise provides any support for the Federal Circuit's refusal to apply the "emphatic" and "highly detailed

technical" limitation periods established by Congress for the recovery of taxes. *Brockamp*, 519 U.S. at 350.

B. The Express Textual Exclusivity Of The Tax-Refund Scheme Is Reinforced By The Principle That A Precisely Drawn, Detailed Remedy Precludes Resort To A More General Remedy

1. Even if the plain text of the Internal Revenue Code did not expressly bar the Federal Circuit's "alternative" remedy, fundamental principles of statutory construction would compel the same result. This Court has frequently held, even in the absence of language as emphatic as in Section 7422(a), that where Congress has enacted a comprehensive statutory scheme that provides an orderly and adequate means by which all challenges to an asserted liability may be adjudicated, that statutory scheme is exclusive. *E.g.*, *Brown v. GSA*, 425 U.S. 820, 834 (1976); *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 395 (1934); *Snyder* v. *Marks*, 109 U.S. 189, 193 (1883). Indeed, as recently as last Term, the Court twice reaffirmed and reinforced that principle in the tax context.

In *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763 (2007), for example, the Court held that a party could not evade the specific restrictions, including a shorter limitation period, of a tax remedial scheme that was "better-fitted" to its claims by resorting to the more generous terms of the Tucker Act, 28 U.S.C. 1346(a)(1). In that case, a trust sought to challenge a government levy on its property that was designed to collect the taxes owed by a taxpayer other than the trust. *EC Term of Years*, 127 S. Ct. at 1766. Having failed to bring a timely action under 26 U.S.C. 7426—which provides for wrongful-levy actions by third parties

in the trust's situation—the trust instead brought a tax-refund suit in federal district court, relying on the Tucker Act's general tax-refund jurisdiction, 28 U.S.C. 1346(a)(1), and the relatively longer limitation period for tax-refund suits. *EC Term of Years*, 127 S. Ct. at 1766-1767 & n.2.

The Court rejected that attempt, holding that "a precisely drawn, detailed statute pre-empts more general remedies," and that the preemption principle is further "brace[d] * * * when resort to a general remedy would effectively extend the limitations period for the specific one." *EC Term of Years*, 127 S. Ct. at 1767 (quoting *Brown*, 425 U.S. at 834). The Court reasoned that "if third parties could avail themselves of the general tax refund jurisdiction of § 1346(a)(1), they could effortlessly evade the levy statute's 9-month limitations period." *Ibid.*

Similarly, the Court held in *Hinck* v. *United States*, 127 S. Ct. 2011, 2014-2018 (2007), that 26 U.S.C. 6404(h) (Supp. IV 2004), which permits a taxpayer to challenge in the Tax Court the IRS's refusal to abate interest on unpaid tax liabilities, provides the exclusive means by which a taxpayer can bring such a challenge. In so holding, the Court rejected the taxpayers' argument that they could also seek review of abatement-of-interest determinations "under statutes granting jurisdiction to the district courts and the Court of Federal Claims to review tax refund actions." *Id.* at 2016 (citing 28 U.S.C. 1346(a)(1), 1491(a)(1); 26 U.S.C. 7422(a)). Rather, the Court concluded, the "precisely drawn, detailed statute" of Section 6404(h), including its specification of the Tax Court as "the forum for adjudication," preempted resort to the more general jurisdictional provisions of the Tucker Act. *Id.* at 2015. In so holding, the Court rejec-

ted the taxpayers' attempt to rely on one portion of the remedy afforded by Section 6404(h), namely "the portion specifying a standard of review," while "circumvent[ing] the other limiting features Congress placed in the *same* statute—restrictions such as a shorter statute of limitations than general refund suits * * * or a net-worth ceiling for plaintiffs eligible to bring suit." *Id.* at 2016.

2. a. The reasoning of *EC Term of Years* and *Hinck* applies *a fortiori* here, and is irreconcilable with the decision below. Congress has established a careful and thorough remedial scheme to resolve the very type of claim asserted by respondents: the tax-refund mechanism, which comprehensively provides for the refund of any internal revenue taxes that were illegally or erroneously assessed or collected. See Pet. App. 37a-38a (complaint seeking "damages consisting of a refund"). That comprehensive scheme expressly preempts resort to more general remedies, particularly those that are subject to a more generous statute of limitations, and it precludes respondents from relying on one portion of that comprehensive scheme (*i.e.*, the allowance of interest) while evading others.

As discussed, the congressionally crafted remedial scheme for recovery of tax overpayments establishes a mandatory administrative claims process that is subject to a three-year limitation period, and provides for judicial relief only after compliance with that administrative process (subject to a separate statute of limitations). 26 U.S.C. 6511(a) and (b)(1), 6532(a)(1), 7422(a). In addition, Congress has granted concurrent jurisdiction to the Court of Federal Claims and the federal district courts to hear tax-refund claims. 28 U.S.C. 1346(a)(1),

1491(a).[5] Congress has further provided that "interest shall be allowed," in the event of "any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax," at a rate established by 26 U.S.C. 6621 "from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days." 28 U.S.C. 2411.

Those provisions are all components of a carefully integrated remedial scheme. See *Flora* v. *United States*, 362 U.S. 145, 157 (1960) (describing the "carefully articulated and quite complicated structure" of the statutes requiring submission of a refund claim and, in some circumstances, prepayment of tax). Accordingly, while Congress conferred jurisdiction to hear tax-refund claims in "spacious terms," this Court has made clear that those jurisdictional grants "must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit upon compliance with certain conditions." *United States* v. *Dalm*, 494 U.S. 596, 601-602 (1990) (holding that the restrictions in Section 7422(a) and Section 6511(a) applied to a taxpayer's invocation of Section 1346(a)(1)'s jurisdictional grant); see, *e.g.*, *Commissioner* v. *Lundy*, 516 U.S. 235, 240 (1996) (noting in dicta that "timely filing of a refund claim" pursuant to 26 U.S.C. 7422(a) is "a jurisdictional

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[5] Section 1346(a)(1) grants district courts original jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." Section 1491(a) provides the Court of Federal Claims with jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." See generally *Flora* v. *United States*, 362 U.S. 145, 151-152 (1960) (discussing historical development of Tucker Act jurisdiction in tax context).

prerequisite" to bringing a refund suit in either the Court of Federal Claims or a federal district court); *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272-273 (1931) (holding that failure to file an administrative refund claim barred a tax-refund suit in the Court of Claims); *Baltimore & Ohio R.R.* v. *United States*, 260 U.S. 565 (1923) (same); *New York & Cuba Mail*, 200 U.S. at 491-495.

The comprehensive remedial scheme for tax-refund claims allows taxpayers an opportunity to challenge taxes that they contend have been erroneously or illegally collected, while ensuring the orderly administration and adjudication of such claims. Section 7422(a)'s claim-filing requirements serve both (1) to give the IRS notice of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination; and (2) to provide the IRS with an opportunity to correct any conceded errors, and if disagreement remains, to limit the scope of any ensuing litigation to those issues that the IRS has examined and is willing to defend. See, *e.g.*, *Felt & Tarrant*, 283 U.S. at 272. The prescribed time limits, see 26 U.S.C. 6511(a), 6532(a)(1), also ensure that claims are made promptly, and that the IRS has adequate time to review a claim before a suit is filed. Compare 26 U.S.C. 6532(a)(1) (allowing the IRS six months to review an administrative refund claim before suit may be filed), with Fed. R. Civ. P. 12(a)(3)(A) (allowing the United States 60 days to answer a judicial complaint), and Fed. Cl. R. 12(a)(1) (same).

b. Accordingly, as with the specific statutory tax remedies at issue in *EC Term of Years* and *Hinck*, Congress has enacted "a precisely drawn, detailed" statutory scheme specifically tailored to address respondents'

claims for a refund. The detailed and reticulated tax-refund scheme is comprehensive: it designates the fora for adjudication, requires an administrative claim, establishes intricate and inter-related limitation periods, and authorizes judicial relief, including interest. See *EC Term of Years*, 127 S. Ct. at 1766, 1767-1768; *Hinck*, 127 S. Ct. at 2015. And, as in *EC Term of Years* and *Hinck*, the statutory restrictions serve the purpose of ensuring the fair and efficient administration of the tax system—a purpose that would be frustrated by allowing resort to a more general remedy. *Hinck*, 127 S. Ct. at 2016-2017; *EC Term of Years*, 127 S. Ct. at 1766, 1767-1768. The inescapable conclusion mandated by those precedents is that the specific tax-refund remedy is exclusive and preempts respondents' attempt to rely on the Tucker Act's general jurisdictional grant while evading all of the specific limitations established by Congress in the tax context. *Ibid.*[6]

Indeed, it is difficult to see how the decisions in *Hinck* and *EC Term of Years* could be more on point. In both cases, the plaintiffs sought to resort to the relatively more generous terms of the Tucker Act. *Hinck*,

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[6] To be sure, in *EC Term of Years* and *Hinck*, the general remedy to which resort was precluded was the tax-refund remedy, whereas here the tax-refund remedy is the specific remedy that would preclude respondents' resort to another remedy. As the Court's cases make clear, however, the important point is that the tax-refund remedy is the "better-fitted" of the remedies, *EC Term of Years*, 127 S. Ct. at 1767, and the one that Congress specifically tailored for claims like those at issue here. The statute dealing with tax claims may be less specific than one dealing with tax *levy* claims, as in *EC Term of Years*, but it certainly is more specific (and "better fitted" here) than the general jurisdictional grant embodied in the Tucker Act, standing alone, which deals with a wide array of claims against the government, including but not limited to tax claims.

127 S. Ct. at 2016; *EC Term of Years*, 127 S. Ct. at 1767. And, in both cases, the Court rejected those attempts based on the governing legal principle that the Federal Circuit failed to apply here: When Congress has created a comprehensive remedial scheme addressed to the plaintiff's situation, the plaintiff cannot circumvent the restrictions on that remedy by resorting to general (and more generous) remedial provisions.

Here, the court of appeals sanctioned precisely the sort of circumvention condemned by this Court in *EC Term of Years* and *Hinck*. It allowed respondents to pursue their monetary claims for a tax "refund" (Pet. App. 37a-38a)—including interest on their "overpayment" of tax—under the general provisions of the Tucker Act, without regard to the comprehensive, and carefully reticulated, remedial provisions for tax-refund claims. See *id.* at 2a-6a. The court of appeals thereby allowed respondents to evade the Internal Revenue Code's mandatory and expressly applicable administrative-claim requirement. 26 U.S.C. 7422(a); see pp. 13-19, *supra*. The court also permitted respondents to circumvent the relatively shorter, and more detailed, time limitations set forth for administrative-refund claims and subsequent judicial proceedings. See 26 U.S.C. 6511(a) and (b), 6532(a)(1) and (2). Like the trust in *EC Term of Years*, respondents should not be allowed to re-label their claims and thereby "effortlessly evade" the restrictions that Congress placed on the remedy specifically tailored for those claims. 127 S. Ct. at 1767-1768. As this Court has aptly observed, "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Brown*, 425 U.S. at 833.

3. If there were any doubt about whether respondents were required to comply with the procedural requirements applicable to tax-refund cases, that doubt would have to be resolved in favor of the government. It is axiomatic that the United States cannot be sued unless Congress has waived the government's sovereign immunity. See U.S. Const. Art. I, § 9, Cl. 7 (Appropriations Clause). Waivers of that immunity, and terms and conditions that Congress attaches to those waivers, are strictly construed. See, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33, 34, 37 (1992); *Dalm*, 494 U.S. at 608; *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). "A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms" requiring strict construction. *Dalm*, 494 U.S. at 608; see *Block*, 461 U.S. at 287; *Finn* v. *United States*, 123 U.S. 227, 232 (1887); see also *John R. Sand & Gravel Co.*, *supra*, slip op. 3.

Thus, when a party fails to commence a suit against the United States within the limitation period, the government has not waived its sovereign immunity, and courts lack authority to entertain the suit. *E.g.*, *Dalm*, 494 U.S. at 608-610. And even when Congress has provided one statute of limitations for a general class of actions, it nevertheless can "provide less liberally for particular actions which, because of special considerations, require[] different treatment." *A.S. Kreider*, 313 U.S. at 447. Congress has done precisely that with respect to tax-refund suits. *Ibid.*; see 26 U.S.C. 6511(a), 6532(a)(1). To allow taxpayers like respondents to avoid the restrictions on Congress's waiver of the United States' sovereign immunity for tax-refund claims by seeking a refund directly under the Export Clause (or

some other constitutional provision[7]) would improperly permit Congress's "careful and thorough remedial scheme to be circumvented by artful pleading." *Brown*, 425 U.S. at 833.

Congress unquestionably has the authority to specify the conditions (including procedural limitations) under which the United States waives sovereign immunity and agrees to be sued. *Block*, 461 U.S. at 287. That authority "applies alike to causes of action arising under acts of Congress and to those arising from some violation of rights conferred upon the citizen by the Constitution." *Lynch* v. *United States*, 292 U.S. 571, 582 (1934) (citation omitted); see *Block*, 461 U.S. at 291-292; *Schillinger* v. *United States*, 155 U.S. 163, 168 (1894). Neither the court of appeals nor respondents disputed that constitutional claims such as their purported Export Clause claim are subject to limitation. Indeed, although respondents asserted that they have paid the coal excise tax since its 1978 enactment, Pet. App. 36a, they are not seeking recovery of taxes paid before 1994, because even if their claims are treated as arising under the Constitution, they still must comply with the procedural limita-

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[7] Indeed, under the decision of the court of appeals, any allegedly unconstitutional tax would be a potential candidate for recognition of an "alternative" avenue of relief directly under the Constitution that would similarly evade the statutory prerequisites to refund suits. See, *e.g.*, U.S. Const. Art. I, § 8, Cl. 1, § 9, Cl. 4 (Uniformity and Direct Tax Clauses, both of which are framed in mandatory terms similar to the Export Clause); see also, *e.g.*, *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989) (disallowance of federal tax deduction alleged to violate the Establishment and Free Exercise Clauses); *United States* v. *Hemme*, 476 U.S. 558 (1986) (federal tax alleged to violate the Due Process Clause). The Federal Circuit's loophole in the comprehensive tax remedial scheme crafted by Congress should not be allowed to remain open.

tions attached to the Tucker Act's conditional waiver of sovereign immunity, including its six-year "outside limit" for bringing suit, 28 U.S.C. 2501. See Pet. App. 9a, 14a; Resp. C.A. Reply/Response Br. 30. But just as the constitutional nature of their claim does not exempt them from the Tucker Act's limitation, it does not somehow strengthen their argument for applying the Tucker Act's general outside limit, rather than the specific limitations applicable to tax-refund claims.

The court of appeals therefore erred in failing to apply (or even to examine) the unambiguous terms of Sections 7422(a) and 6511(a). Because respondents are seeking to "maintain[]" a "suit * * * for the recovery of an[] internal revenue tax alleged to have been * * * illegally assessed," Section 7422(a) required them first to "duly file[] with the Secretary" a "claim for refund." Section 6511(a), in turn, required that their "claim" be filed within three years after the relevant tax return was filed. Respondents failed to meet those requirements, and their claims—however characterized—are therefore barred.[8]

C. Respondents Have No Cause Of Action Directly Under The Export Clause

The court of appeals appeared to deviate from the result compelled by the statutory text and this Court's cases based on its view that the Export Clause "affords

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[8] The logic of the position embraced by respondents and the court below would obviate the need for respondents to comply with the tax-refund scheme for *any* tax years, including the ones for which they sought and received a full refund. There is no justification for such needless litigation in the face of a clear congressional preference for exhausting the administrative refund procedures. And there is no justification for ignoring the other judgments of Congress in the specific tax-refund context, such as the statutes of limitations.

an independent cause of action for monetary remedies" against the United States. *Cyprus Amax*, 205 F.3d at 1373. That conclusion gets the matter backwards. A party cannot avoid the statutory procedures for obtaining relief for a constitutional violation by asserting that the underlying constitutional provision creates its own freestanding cause of action. To the contrary, the existence of the statutory remedy is a compelling reason not to infer a cause of action directly under the Constitution.[9]

Even beyond this basic conceptual difficulty, the court of appeals' Export Clause analysis was flawed. As this Court has repeatedly cautioned, a "freestanding damages remedy for a claimed constitutional violation * * * is not an automatic entitlement"; to the contrary, "in most instances" such a remedy is "unjustified." *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2597 (2007). No exception to that general rule is warranted here.

1. Nothing in the text of the Export Clause suggests that the Framers intended to create a constitutionally based private cause of action against the United States for money damages. Rather, the language of the provision is purely prohibitory: "No Tax or Duty shall be laid on Articles exported from any State." The preceding section of Article I grants Congress the power to "lay and collect Taxes," U.S. Const., Art. I, § 8, Cl. 1, and the Export Clause (like other provisions of Article I, Section 9) simply limits that power. Like the overwhelming majority of constitutional restrictions on the federal and state governments, the Export Clause does not specify

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[9] The logic of the court of appeals would suggest that a *Bivens* action should be inferred whenever a constitutional claim under 42 U.S.C. 1983 would be time-barred. Of course, the existence of 42 U.S.C. 1983 is one reason why the courts do not infer *Bivens* actions against state officials.

how, or whether, private plaintiffs may enforce the restriction.

The statutory tax-refund remedy undisputedly is a fully adequate means of enforcement. Taxpayers may raise their Export Clause challenges and receive monetary remedies (tax refunds and interest) if those challenges are sustained. The court of appeals nonetheless concluded that the "necessary implication" of the Export Clause—and any other constitutional provision that protects "pecuniary interests"—is that the Constitution creates its own "self-executing" money-damages remedy for any unconstitutional tax on exports. *Cyprus Amax*, 205 F.3d at 1373, 1374. That reasoning misreads both the Export Clause and this Court's Tucker Act cases.

a. The court of appeals suggested that this Court had endorsed a freestanding Export Clause cause of action in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998). That case is altogether inapposite. United States Shoe brought an action in the Court of International Trade, asserting that the federal Harbor Maintenance Tax (HMT) violated the Export Clause and seeking a refund. *Id.* at 365-366. But the usual prerequisites for tax-refund actions were expressly *in*applicable to the tax provisions at issue there. See 26 U.S.C. 4462(f)(3) (providing that the HMT "shall not be treated as a tax for purposes of subtitle F [which includes 26 U.S.C. 6511, 6532, and 7422] or any other provision of law relating to the administration and enforcement of internal revenue taxes"). Instead, the HMT was to be treated for jurisdictional purposes "as if such tax were a customs duty," 26 U.S.C. 4462(f)(2), and for that reason the Court of International Trade had exclusive jurisdiction over the case as one that "arises out of" a customs duty. *United States Shoe*, 523 U.S. at 365-366 (cit-

ing 28 U.S.C. 1581(i)(4)). Indeed, this Court noted that the challenge to the tax could *not* have been brought in the Court of Federal Claims under the Tucker Act, as respondents are seeking to do here. See *id.* at 366 n.3. This Court had no occasion to decide whether the Export Clause provides a cause of action for money damages, and it did not do so, contrary to the court of appeals' misreading. See *Cyprus Amax*, 205 F.3d at 1376. *United States Shoe* thus provides no support for the decision below.[10]

The court of appeals sought to bolster its misreading of *United States Shoe* by drawing a faulty analogy between the Export Clause and the Compensation Clause of Article III. The Federal Circuit had previously held that the Compensation Clause creates a monetary remedy for the salary wrongfully withheld from a life-tenured judge. See *Cyprus Amax*, 205 F.3d at 1374-1375 (citing *Hatter* v. *United States*, 953 F.2d 626, 627 (Fed.

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[10] Indeed, this Court did not examine the remedy that the lower courts had awarded. The sole question presented was whether the tax violated the Export Clause on the merits. See Pet. at i, *United States Shoe*, *supra* (No. 97-372). And the lower courts concluded that the cause of action to challenge the HMT arose either under the "federal statutes governing import transactions," *United States Shoe Corp.* v. *United States*, 19 Ct. Int'l Trade 1284, 1296 (1995), aff'd, 114 F.3d 1564 (Fed. Cir. 1997), aff'd, 523 U.S. 360 (1998), or under the statute permitting judicial review of a protest denied by the Customs Service, 28 U.S.C. 2631(a). See *Swisher Int'l, Inc.* v. *United States*, 205 F.3d 1358, 1364-1365, 1369 (Fed. Cir.), cert. denied, 531 U.S. 1036 (2000); see also *Stone Container Corp.* v. *United States*, 299 F.3d 1345, 1351 (Fed. Cir. 2000) (rejecting an attempt to sue for recovery of the HMT under the Tucker Act and thereby obtain a longer statute of limitations, because "neither the Supreme Court nor [the Federal Circuit]" nor "any other court" had "ever suggested that a suit for recovery of the HMT could be maintained under the Tucker Act with its six-year statute of limitations"), cert. denied, 532 U.S. 971 (2001).

Cir. 1992)). Nothing in *Hatter* suggests that if Congress fashioned a specific statutory scheme for remedying Compensation Clause claims, any freestanding cause of action would trump that scheme's procedural limits. But that is the basis of respondent's argument concerning the Export Clause.

In any event, the court of appeals vastly overstated the similarity between the two clauses. The court of appeals extended its *Hatter* holding to the Export Clause on the premise that the two constitutional provisions "employ similar language," in that they both "speak in absolute and unconditional terms, and both protect pecuniary interests." *Cyprus Amax*, 205 F.3d at 1375. But the court of appeals overlooked the most salient portion of the Compensation Clause, which had been central to the earlier decision in *Hatter*: the specific requirement that judges "shall * * * receive for their Services, a Compensation, which shall not be diminished." No such language requiring the payment of funds from the federal treasury appears in the Export Clause. Indeed, the Export Clause hardly resembles the Compensation Clause at all. The supposed textual similarities noted by the court of appeals in *Cyprus Amax* are plainly inadequate to justify reading the Export Clause to create a freestanding cause of action. Provisions throughout the Constitution—from Article I, Section 6, Clause 1, through the Twenty-Seventh Amendment—could be said to be worded in "unconditional terms" and to affect "pecuniary interests." The Federal Circuit's proposed rule would seemingly open the Court of Federal Claims to lawsuits for monetary relief brought against the United States under any one of those provisions. See note 7, *supra*. Such a reading of the Constitution is completely inconsistent with this

Court's admonition that "in most instances" there simply is no "freestanding damages remedy for a claimed constitutional violation." *Wilkie*, 127 S. Ct. at 2597; see also *Schillinger*, 155 U.S. at 168 (rejecting a sweeping argument for Tucker Act jurisdiction over constitutional tort claims that, if accepted, would be "equally good applied to every other provision of the Constitution").

b. The court of appeals also thought that applying a Tucker Act analysis to the Export Clause confirmed the existence of a freestanding money-damages remedy. See *Cyprus Amax*, 209 F.3d at 1373 (asserting that the proper analysis under the Tucker Act is whether the Export Clause is "fairly interpreted" as "money-mandating") (citing *James* v. *Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998)). This Court's Tucker Act cases do state that a federal *statute* or *regulation* creates a cause of action against the United States, within the scope of the Tucker Act's waiver of sovereign immunity, if "the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983); accord, *e.g.*, *United States* v. *Navajo Nation*, 537 U.S. 488, 503-505 & n.10 (2003); *United States* v. *Testan*, 424 U.S. 392, 400 (1976). But that has nothing to do with the question here. The Export Clause might be enforceable by alternative means under the Tucker Act in the absence of the statutory tax-refund scheme. But there is no doubt that Export Clause claims can be remedied under the tax-refund scheme and no doubt that the latter statutory remedy is exclusive of any other Tucker Act claim.

Even more fundamentally, determining whether the Constitution creates a self-executing right of action requires quite a different analysis. Indeed, in *Testan* the

Court expressly distinguished the analysis of *statutory* rights of action against the United States from the cases examining suits for just compensation under the Fifth Amendment. 424 U.S. at 401 ("These Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of that constitutional provision.").

In particular, here Congress has already created by statute a right to sue (subject to procedural limitations) to enforce the constitutional provision that respondents have invoked. The question is not whether respondents have a remedy for their allegations that the Export Clause has been violated; the question instead is whether the Constitution gives them a second, independent right of action that effectively overrides the procedural limitations that Congress has placed on the tax-refund remedy. The latter is not a difficult question.

2. When determining whether the Constitution provides plaintiffs with a right to sue, this Court has consistently respected a congressional decision not to subject the United States to suit, or to provide only a limited remedy. While this Court has occasionally discerned an implied cause of action directly under the Constitution, in the cases beginning with *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court has adhered to two key limiting principles that, applied here, foreclose respondents' claims.

First, this Court has "consistently rejected invitations" to create constitutionally based implied rights of action when such remedies are not necessary to provide redress "against *individual officers*" for unconstitutional conduct that would otherwise not be remedied. *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001). Indeed, this Court has unanimously held that

Bivens-type liability will not lie against the United States itself, or any of its agencies, for several reasons. *FDIC* v. *Meyer*, 510 U.S. 471, 483-486 (1994). "[R]ecogniz[ing] a direct action for damages against federal agencies" risks "creating a potentially enormous financial burden for the Federal Government." *Id.* at 486. "[S]uch a significant expansion of Government liability" should be undertaken only by congressional act, not by judicial inference. *Ibid.* And such an expansion would in fact undermine the principal purpose of *Bivens* remedies—namely, to deter unconstitutional conduct by federal officers—by causing plaintiffs to focus their claims instead on the government, which has a reliably deeper pocket and which would not enjoy absolute or qualified immunity, as individual government officials do. See *id.* at 485.

Second, the federal courts have repeatedly declined to infer a new constitutionally based remedy when Congress has already given an opportunity for redress—even when that opportunity is less generous than the allegedly injured party would prefer. The whole point of the *Bivens* doctrine is to address the plight of those for whom "it is damages or nothing." *Davis* v. *Passman*, 442 U.S. 228, 245 (1979) (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)). Even during the days in which the Court was most receptive to *Bivens* claims it was not in the business of supplementing existing statutory means of recovery. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), this Court declined to recognize an implied judicial remedy directly under the First Amendment for federal employees claiming retaliation, because Congress had created a comprehensive civil-service system through which federal employees could challenge adverse personnel actions. *Id.* at 385-390.

Although the Court assumed that the civil-service remedies were "not as effective as an individual damages remedy" under the Constitution, *id.* at 372, the relevant question was "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." *Id.* at 388. The Court declined to tamper with Congress's chosen remedies in that fashion.

The Court reached a similar conclusion in *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), in which several Social Security disability claimants alleged that the termination of their benefits had violated the Due Process Clause and sought to sue the responsible federal officials for damages directly under that Clause. *Id.* at 417-418. Congress had provided them with only a limited remedy: a complex and "unusually protective" administrative process that could and did restore benefits wrongly denied (although it could not award damages for the wrongful denial). *Id.* at 424 (quoting *Heckler* v. *Day*, 467 U.S. 104, 106 (1984)). That framework, this Court held, was more than adequate to show that Congress did not intend to permit Social Security claimants to be able to sue for consequential damages. As in *Bush*, the Court therefore "declined * * * 'to create a new substantive legal liability . . . ' because [it was] convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 426-427 (quoting *Bush*, 462 U.S. at 390).

Both of those principles confirm that the court of appeals was incorrect in recognizing a new cause of action against the United States, directly under the Export Clause. Respondents are not seeking to sue federal

officers to deter unconstitutional conduct; rather, they are seeking a monetary award from the Treasury under the heading of the Tucker Act. But the Tucker Act's waiver of sovereign immunity does not signal Congress's acquiescence in the creation of hitherto unrecognized implied rights of action under the Constitution that are separate and distinct from existing and adequate statutory remedies, in the tax context or otherwise. See *Meyer*, 510 U.S. at 484 (explaining that whether sovereign immunity has been waived is "analytically distinct" from whether a constitutionally based cause of action exists) (quoting *Mitchell*, 463 U.S. at 218). Indeed, in *Meyer* sovereign immunity had been waived, *id.* at 483, but the Court declined to infer a freestanding cause of action against the agency under the Due Process Clause.

Furthermore, the congressionally crafted refund procedure gives claimants in respondents' position a more-than-adequate opportunity to seek relief from any unconstitutionally imposed tax. Taxpayers have at least three years in which to seek a refund from the IRS; they may seek judicial review of any denial; and they may obtain interest on any refund awarded them.[11] Indeed, respondents have successfully used those remedies to obtain refunds for tax years 1997 through 1999. Although they failed to seek a refund with respect to the

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[11] Respondents, of course, are seeking "damages consisting of a refund." Pet. App. 37a-38a. But even if they had also sought consequential damages stemming from the imposition of the allegedly unconstitutional tax, that prayer for additional relief would make no difference to the analysis. In *Chilicky*, for example, the administrative tribunals could award claimants only their wrongly denied benefits; the Court nonetheless refused to give those claimants an additional, constitutionally based cause of action for consequential damages from the denial. See 487 U.S. at 427-428.

three previous tax years, and therefore cannot *now* obtain relief, that fact does not cast any doubt on the adequacy of the refund remedy.

3. This Court's cases considering constitutional challenges to state and local taxes underscore the inappropriateness of the damages remedy that the Federal Circuit has invented. Although this Court has on a number of occasions held that state or local taxes violate various provisions of the federal Constitution, the Court has expressly *declined* to hold that any of those constitutional provisions creates a freestanding federal cause of action for a refund. Rather, so long as States provide some form of meaningful relief—which may or may not entail a post-deprivation refund—the Constitution is satisfied. See, *e.g.*, *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 40-41 (1990) (suggesting that States could comply with a judgment invalidating a discriminatory tax by giving a refund to the over-taxed, imposing a retroactive increase on the under-taxed, or some combination of the two); see also *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100-101 (1993) ("[F]ederal law does not necessarily entitle [taxpayers] to a refund."). "The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements" of certainty and adequacy. *McKesson*, 496 U.S. at 51.

Here Congress has complied fully with its constitutional obligation by making available the refund procedure. See *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 746-747 (1974) (recognizing that the federal refund procedure is a constitutionally adequate remedy); *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 342 (1937). Nowhere did the court of appeals suggest (nor did respondents argue) that respondents could not or would not have obtained

complete relief had they filed a timely refund claim and then, if necessary, proceeded to court within the statutory time periods. Indeed, it is beyond dispute that there was no obstacle preventing respondents from proceeding in that fashion; the original challenge to the application of the coal excise tax to exported coal was initiated by seven coal companies who, before bringing suit, first filed timely refund claims for the single tax quarter at issue. *Ranger Fuel Corp.* v. *United States*, 33 F. Supp. 2d 466, 467-468 (E.D. Va. 1998).

Moreover, in each of its cases examining the adequacy of refund procedures, this Court has taken pains to emphasize that taxing authorities have an entirely legitimate interest in minimizing disruptions to the government's collection and use of its revenue. Thus, to address the valid "concern that [the] obligation to provide refunds for what later turns out to be an unconstitutional tax would undermine the * * * ability to engage in sound fiscal planning," taxing authorities have considerable "freedom to impose various procedural requirements on actions for postdeprivation relief." *McKesson*, 496 U.S. at 44-45. For instance, they may condition post-deprivation relief on "paying under protest or providing some other timely notice of complaint," and they may "enforce relatively short statutes of limitations applicable to such actions." *Id.* at 45. Those are precisely the requirements that Congress has put in place here—requirements that respondents seek to circumvent by suing directly under the Export Clause without regard to the limits imposed by Congress on the tax-refund remedy.

D. The Court of Appeals Compounded Its Earlier Error By Granting Respondents Interest Under The Very Statutory Scheme It Had Previously Held Inapplicable

The Federal Circuit's award of interest to respondents compounded its error. Respondents claimed that they were not proceeding under the tax-refund statute, in order to evade the administrative claim requirement and the three-year statute of limitations, but they simultaneously asserted that they were entitled to interest under a statute applicable only to tax refunds. Such an attempt to pick and choose among the elements of Congress's comprehensive remedial mechanism is precisely what this Court condemned in *Hinck*, and the court of appeals erred by allowing respondents "to isolate one feature of th[e] 'precisely drawn, detailed'" tax-refund remedial scheme that they liked—the allowance of interest—without requiring them to comply with the limitations of that same scheme. *Hinck*, 127 S. Ct. at 2016 (quoting *EC Term of Years*, 127 S. Ct. at 1767). "Congress plainly envisioned [the remedy] as a package deal," *ibid.*, but in this case the court of appeals improperly untied the package and discarded most of its contents.

1. "[I]nterest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Library of Cong.* v. *Shaw*, 478 U.S. 310, 311 (1986). That "traditional legal rule regarding the immunity of the United States from interest" (*id.* at 317) is codified in the Judicial Code, which specifies that "[i]nterest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for

payment thereof." 28 U.S.C. 2516(a). And when a plaintiff claims that a statute *does* waive the government's immunity from interest, the courts scrutinize that assertion with "an added gloss of strictness," even more so than other limited waivers of sovereign immunity. *Shaw*, 478 U.S. at 318. Without clear and express statutory authorization, the Court of Federal Claims simply cannot award interest.

The court of appeals therefore erred in relying on "general damages principles," Pet. App. 1a, and in appealing to the diffuse notion that "the government should pay for its use of a taxpayer's money," *id.* at 5a, as justifications for its award of interest. Those generalities do not satisfy the requirements for demonstrating an interest-specific waiver of sovereign immunity. Nor was it appropriate for the court of appeals to turn to the legislative history of Section 2411, see Pet. App. 5a-6a (discussing H.R. Rep. No. 179, 68th Cong., 1st Sess. 35 (1924)). If the requisite "clarity does not exist [in Section 2411], it cannot be supplied by a committee report." *Nordic Vill.*, 503 U.S. at 37 (explaining that "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text").

2. The court of appeals' basis for finding interest authorized, but the administrative-claim requirement excused, was internally inconsistent, as can be seen from the face of the operative statutes. The court of appeals reasoned that the judgment in respondents' favor was a "judgment * * * rendered * * * for any overpayment in respect of any internal-revenue tax," making an award of interest appropriate. Pet. App. 4a (quoting 28 U.S.C. 2411). But in reaffirming *Cyprus Amax* as controlling, the court simultaneously held that respondents

were not required to file administrative claims because this case was *not* a "suit or proceeding * * * for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed," 26 U.S.C. 7422(a). There simply is no meaningful distinction in this context between a suit for an "overpayment in respect of any internal-revenue tax" and a suit "for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed."

Indeed, Section 6511(a), which sets out the time limits for Section 7422(a)'s administrative-claim requirement, refers to a "[c]laim for credit or refund of an *overpayment* of any tax imposed by this title." 26 U.S.C. 6511(a) (emphasis added). Construing Section 6511, this Court indicated that the term "overpayment" of tax is essentially synonymous with Section 7422(a)'s reference to erroneously, illegally, or wrongfully collected taxes:

> Section 6511(a) applies to claims for refund of a tax "overpayment." The commonsense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all. * * * The word encompasses "erroneously," "illegally," or "wrongfully" collected taxes, as those terms are used in * * * § 7422(a).

Dalm, 494 U.S. at 609 n.6. The court of appeals improperly departed from this Court's construction of the relevant statutory terms—and defied common sense—by holding, in effect, that a claim for recovery of an "overpayment" of an unconstitutionally collected tax is not a claim for recovery of an "erroneously," "illegally," or "wrongfully" collected tax.

The court of appeals' decision on the interest question further exacerbated the problems created by *Cy-*

prus Amax. The interest statute is an integral part of the framework for processing tax-refund claims, both administratively and in court.[12] When a taxpayer seeks to recover unconstitutionally imposed taxes, with interest thereon, he must proceed under that single framework in all respects, including the exhaustion and timing requirements. The court of appeals erred in authorizing selective departure from the remedial scheme established by Congress.

---

[12] The closeness of the relationship can be seen from the original wording of the interest provision and the administrative-claim provision. When the provision now codified at Section 2411 was amended in 1921, it provided that interest was allowed in a judgment for "any internal-revenue tax erroneously or illegally assessed or collected." Revenue Act of 1921, ch. 136, § 1324(b), 42 Stat. 316. Those are the same key words that appeared in Section 7422(a), the administrative-exhaustion provision, at the time (and still appear there today). Although Section 2411 was amended a few years later (in 1928) to substitute the shorter phrase "any overpayment," see Revenue Act of 1928, ch. 852, §§ 614-615, 45 Stat. 876-877, "[t]he legislative history * * * appears to attribute no significance whatsoever to this shift in language." *Usibelli Coal Mine* v. *United States*, 54 Fed. Cl. 373, 383 & n.22 (2002) (citing H.R. Rep. No. 2, 70th Cong., 1st Sess. 35 (1927); S. Rep. No. 960, 70th Cong., 1st Sess. 43 (1928)), appeal docketed, Fed. Cir. No. 06-5068. The parallel statutory language is strong evidence that Congress intended interest and administrative exhaustion to form components of the same refund-remedy package.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded to be dismissed for lack of jurisdiction.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
RICHARD T. MORRISON
Acting Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
GILBERT S. ROTHENBERG
Acting Deputy Assistant Attorney General
WILLIAM M. JAY
Assistant to the Solicitor General
KENNETH L. GREENE
STEVEN W. PARKS
Attorneys

JANUARY 2008

APPENDIX

1. Article 1, Section 9, Clause 5 of the United States Constitution (the Export Clause) provides:

No Tax or Duty shall be laid on Articles exported from any State.

2. Section 6511 of Title 26 of the United States Code provides, in relevant part:

Limitations on credit or refund

(a) Period of limitation on filing claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) Limitation on allowance of credits and refunds

(1) Filing of claim within prescribed period

No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

* * * * *

3. Section 6532 of Title 26 of the United States Code provides, in relevant part:

Periods of limitation on suits

(a) Suits by taxpayers for refund

(1) General rule

No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of time

The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

* * * * *

4. Section 7422 of Title 26 of the United States Code provides, in relevant part:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been col-

lected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * * * *

5. Section 1346 of Title 28 of the United States Code provides, in relevant part:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * * *

6. Section 1491 of Title 28 of the United States Code provides, in relevant part:

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation

of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

* * * * *

7. Section 2411 of Title 28 of the United States Code provides:

Interest

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

8. Section 2501 of Title 28 of the United States Code provides, in relevant part:

Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * * * *

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No. 07-308

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

CLINTWOOD ELKHORN MINING COMPANY, ET AL.
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENTS

STEVEN H. BECKER
PAUL A. HOROWITZ
SUZANNE I. OFFERMAN
BAKER & MCKENZIE LLP
1114 Avenue of the Americas
New York, NY 10036
(212) 626-4100

PATRICIA A. MILLETT
(Counsel of Record)
THOMAS C. GOLDSTEIN
STEVEN C. WU
MONICA P. SEKHON
AKIN GUMP STRAUSS HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

FEBRUARY 13, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a taxpayer's suit under the Tucker Act, 28 U.S.C. 1491(a), seeking damages and interest for a violation of the Constitution's absolute preclusion of congressional tax power over exports, is foreclosed by the Internal Revenue Code's tax refund scheme.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, the United States of America, was the defendant in the Court of Federal Claims.

The respondents, who were plaintiffs below, are the Clintwood Elkhorn Mining Company, the Gatliff Coal Company, and the Premier Elkhorn Coal Company. The only parent companies or companies that own 10% or more of the stock of those parties are TECO Coal Corporation and TECO Energy, Inc.

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STATEMENT

1. The command of the Export Clause of the Constitution to Congress is direct and absolute: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, cl. 5. Consistent with the Export Clause, Congress has generally exempted export sales from federal taxation. See 26 U.S.C. 4221(a)(2).[1] In 1978, however, Congress levied an excise tax on coal production and sales, 26 U.S.C. 4121, and expressly directed that the tax would apply to sales of coal for export, 26 U.S.C. 4221(a) (excepting from the export ban the tax imposed "under section 4121").[2]

2. In 1998, a number of companies challenged the constitutionality of the export tax on coal. In that case, "the government [did] not provide[] * * * any basis" for defending the tax as constitutional, and the court was "not able to discern any basis to distinguish the Coal Excise Tax from" other taxes previously held unconstitutional. *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466, 469 (E.D. Va. 1998). The court accordingly held that the tax violated the Export Clause. *Ibid.* The government did not appeal. Pet. App. 2a. Seventeen months later, the IRS acquiesced

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[1] That section provides, in relevant part, that "no tax shall be imposed under this chapter [governing manufacturers excise taxes] * * * on the sale by the manufacturer * * * [or] on the first retail sale[] of an article * * * for export, or for resale by the purchaser to a second purchaser for export." 26 U.S.C. 4221(a)(2).

[2] A tax imposed by Congress on the removal of fuel from refineries and terminals, 26 U.S.C. 4081, does not extend to exports. 26 C.F.R. 48.4081-3(f)(2). IRS regulations ensure that vaccine exports are not taxed. 26 C.F.R. 48.4221-3(e).

in the decision. See Notice 2000-28, 2000-1 C.B. 1116 (2000).

3. Respondents, Clintwood Elkhorn Mining Company, Gatliff Coal Company, and Premier Elkhorn Coal Company ("the Companies"), paid taxes on their export sales of coal under 26 U.S.C. 4121 and 4221(a). Pet. App. 3a, 9a, 36a. In April 2000, the Companies filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a), seeking monetary relief for the government's violation of the Export Clause, "including recovery" of the export taxes paid over the previous six years, Pet. App. 31a, "such other and further relief as th[e] Court may deem just and proper," and interest, *id.* at 38a. With respect to payments made during the three-year period immediately preceding the lawsuit (1996-1999), the Companies also filed administrative refund claims, pursuant to 26 U.S.C. 6511(a), and the government paid those claims with interest. See Pet. 4; Pet. App. 3a.

Following the Federal Circuit's decision in *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001), the Court of Federal Claims held that the Companies could pursue their "claims for damage under the Export Clause" (Pet. App. 17a) pursuant to the Tucker Act, rather than proceed under the administrative tax refund scheme. See Pet. App. 13a, 17a.[3] The court

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[3] Under 26 U.S.C. 7422(a), taxpayers must file an administrative claim with the IRS before filing suit to recover "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." That administrative claim must be filed within three years from the time the return was filed or two

held, however, that the Companies were not entitled to interest under 28 U.S.C. 2411, because the Companies "are not seeking tax refunds." Pet. App. 17a.[4]

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-6a. The court first reaffirmed its holding in *Cyprus Amax* that the Export Clause gives rise to a claim for money damages under the Tucker Act. *Id.* at 2a-3a.

The court of appeals also held that the Companies were entitled to interest on their damages claim under 28 U.S.C. 2411. Pet. App. 3a-6a. The court explained that Section 2411 "is a straightforward recognition that the government should pay for its use of a taxpayer's money to which the government was not entitled," *id.* at 5a, and that "a tax overpayment is not fully remedied unless it includes interest for the time that the money was in the hands of the government," *id.* at 6a.

SUMMARY OF ARGUMENT

1. In *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998), this Court unanimously recognized that the Export Clause is a uniquely "simple, direct, unqualified prohibition" on congressional taxing power that is unlike any other constitutional constraint on the government's taxing authority. *Id.* at 368. That comprehensive excision of taxing authority includes not only the total exclusion of a particular commer-

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years from the time the tax was paid, whichever occurs later. 26 U.S.C. 6511.

[4] Section 2411 of Title 28 provides for the payment of interest on "any judgment of any court" rendered against the United States for any "overpayment in respect of any internal-revenue tax."

cial activity – exporting – as a source of federal revenue, but also the denial of congressional authority to exercise any form of tax regulatory authority over exports and exporters. Thus, while other constitutional provisions regulate *how* Congress can collect tax revenues, the Export Clause is an unbending and unqualified prohibition on the *use* of exports as either a source of revenue or object of tax regulatory power at all.

Because of its unique scope and function, the Export Clause can properly be enforced through an action under the Tucker Act. The Export Clause's command that exports be completely free from taxation and excluded as a source of federal tax revenue mandates monetary compensation for taxes collected in direct contravention of its terms. Practically speaking, the only way to enforce a complete exclusion of funds from revenue is to take the full and equivalent value of those funds back out of the revenue if they have been unconstitutionally collected.

2. That Tucker Act remedy for Export Clause claims has not been clearly withdrawn. Contrary to the government's argument, the test for withdrawal of federal court jurisdiction over constitutional claims is not whether one statutory scheme seems to have more rules than the other, but turns upon which remedial provision is better-suited to enforcing the right at issue.

The Tucker Act's specific provision for prosecuting constitutional damages claims is the best means of enforcing the Export Clause. The Tucker Act was explicitly designed to provide a forum, with appropriate procedures and limitations periods, to vindicate

specified constitutional interests. The general administrative tax refund scheme, by contrast, cannot properly remediate Export Clause claims because that scheme was specifically designed to protect the very revenue interests that the Export Clause repudiates. Nothing in the text or history of the administrative review provisions evidences Congress's intention to take the constitutionally dubious step of carving Export Clause claims out of the Tucker Act for singularly restrictive limitation and forcing exporters to traverse a congressionally designed, time-delayed, pro-government, and revenue-protective administrative refund procedure before recouping funds taken in the utter absence of any legitimate congressional taxing authority.

At bottom, the government's position assumes that an export tax is no different from any routine tax or tax dispute. But the central point of the Export Clause is that exports are profoundly different and entirely off limits to Congress's tax powers. That is both a substantive and procedural excision of congressional power: where Congress completely lacks the power to tax, it equally lacks the power to insulate violations of that prohibition against comprehensive and prompt judicial remediation, or otherwise to require that any thumb be put on the government's side of the remedial scale.

Finally, as a matter of statutory construction, this Court has already held that other specialized constraints on the review of tax challenges, like the Tax Injunction Act do not apply when the tax at issue is unlawful on its face. See *Enochs v. Williams Packing*

& Navigation Co., 370 U.S. 1 (1962). Neither should they apply here.

3. The Tucker Act remedy for an Export Clause violation includes interest. The plain terms of the interest statute, 28 U.S.C. 2411, embrace "any judgment" of "any court" rendered for "any overpayment" "in respect of" an internal revenue tax, and this Court has directed that "overpayment" be broadly interpreted.

Moreover, the Export Clause, like the Fifth Amendment's Takings Clause, would require the payment of interest in its own right. The only means of enforcing the Export Clause's absolute prohibition on the use of exports as a source of revenue is to return to the taxpayer the full value of funds unconstitutionally exacted. To permit the government to enjoy the time value of export taxes would sanction the very revenue usage of exports that the Export Clause flatly proscribes.

ARGUMENT

CONSTITUTIONAL CLAIMS UNDER THE EXPORT CLAUSE FOR MONETARY COMPENSATION AND INTEREST MAY PROPERLY BE BROUGHT UNDER THE TUCKER ACT

The central premise of the government's argument is that this case involves an ordinary tax challenge to an ordinary exercise of Congress's established taxing power, which Congress plainly intended to be adjudicated through its general administrative tax refund scheme. There are two fundamental flaws with that position.

First, the starting premise is all wrong. This case is about the vindication of a constitutional claim under the Export Clause that, by its terms, denies the very assumption of tax authority and routine tax treatment that the government presupposes. Congress enacted the Tucker Act as the specific remedial scheme for constitutional claims, and, because the Export Clause is money-mandating, the Companies' Export Clause claim is remediable under the Tucker Act.

Second, Congress did not expressly withdraw that Tucker Act remedy for Export Clause claims and, in fact, the Tucker Act is better fitted to redressing such claims. There is substantial doubt that Congress has the constitutional authority to carve Export Clause claims out of the Tucker Act and to subject them to distinct burdens, delays, and constraints in an administrative tax scheme that is predicated on the very existence of the governmental tax power and the revenue-protective interests that the Export Clause renounces. Particularly when the export tax at issue is so plainly beyond Congress's tax authority that it cannot colorably be defended as constitutional, Congress likely intended claims aimed at undoing that illegitimate exaction to proceed under established statutory provisions for enforcing the Constitution.

A. The Unique And Comprehensive Preclusion Of Congressional Authority In The Export Clause Gives Rise To A Cause Of Action Enforceable Under The Tucker Act

1. The Tucker Act Remedies Violations of Money-Mandating Constitutional Provisions

While the government portrays this as a case of taxpayers attempting to circumvent the administrative tax scheme (Br. 12-29), that gets the issue backwards. The Companies seek compensation for the violation of a constitutional right guaranteed by the Export Clause. Congress enacted the Tucker Act specifically to resolve such constitutional claims. That Act regulates and controls when a particular subset of claims – those that are both for money damages and "founded * * * upon the Constitution" or federal law – can be prosecuted in federal court against a particular defendant – the United States. 28 U.S.C. 1346(a)(2), 1491(a)(1). Congress further identified which courts under which circumstances should have jurisdiction over those claims, giving federal district courts jurisdiction only when the amount in controversy is less than $10,000, 28 U.S.C. 1346(a)(2), and assigning all other such claims to the Court of Federal Claims, 28 U.S.C. 1491(a)(1), unless they fall within the exclusive jurisdiction of another specialized court, 28 U.S.C. 1491(c). Congress also adopted a specific six-year statute of limitations that it considered to be appropriate for the preservation and prosecution of money-mandating constitutional claims. 28 U.S.C. 2501. Enactment of the Tucker Act, moreover, postdates Congress's adoption of the

administrative tax refund scheme.[5] The Tucker Act thus constitutes a comprehensive remedial scheme for "any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976).

2. The Export Clause Mandates Monetary Compensation for its Violation

A source of substantive law is money-mandating if it "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 218 (1983). That "'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). "[A] fair inference" that damages were intended "will do." *Id.* at 473. The Export Clause's unqualified and absolute prohibition on economic diminishment through taxation and complete preclusion of exports as a source of federal revenue "permits a fair inference," *ibid.*, that the law provides monetary relief.[6]

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[5] The original version of Section 7422 was enacted in 1866 in substantially its current form. See Revenue Act of 1866, ch. 184, § 19, 14 Stat. 98, 152; see also *Flora v. United States*, 362 U.S. 145, 155 n.16 (1960). The Tucker Act was not enacted until two decades later. See Act of Mar. 3, 1887, ch. 359, 24 Stat. 505, 505-08.

[6] The government's suggestion (Br. 34) that the "fairly interpreted" standard applies only to the enforcement of statutes and regulations under the Tucker Act is without merit. The Tucker Act's statutory text provides no basis for adopting two different legal tests for sources of law that the statute treats as equivalents. See, *e.g.*, *Mitchell*, 463 U.S. at 216-217 (a "claim invoking

a. The Export Clause is a unique and uniquely comprehensive preclusion of congressional tax power

"[T]he Export Clause's simple, direct, unqualified prohibition," *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 368 (1998), is as comprehensive a preclusion of congressional power as its language suggests. The Clause "strictly prohibits any tax or duty," whether "discriminatory or not, that falls on exports during the course of exportation." *United States v. IBM Corp.*, 517 U.S. 843, 848 (1996). The prohibition applies both to direct and indirect burdens on exports, and includes not just the taxation of imports themselves, but also the taxation of activities "embraced in exportation or any of its processes." *William E. Peck & Co. v. Lowe*, 247 U.S. 165 (1918). See also *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69-70 (1923) (invalidating tax on sales to export carrier); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 27 (1915) (tax on marine insurance unconstitutional because insurance "is one of the necessities of exportation"); *United States v. Hvoslef*, 237 U.S. 1, 17 (1915) (tax on ship charters "was in substance a tax on the exportation"); *Fairbank v. United States*, 181 U.S. 283, 294 (1901) (invalidating tax on bills of lading as "in effect a duty on the article transported").[7]

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the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act" if "the source of substantive law" is money-mandating).

[7] The Export Clause, however, does not bar nondiscriminatory taxes on "pre-export goods and services," or on "activities only tangentially related to the export process." *IBM*,

The Export Clause thus is not a mere limitation on an otherwise plenary grant of taxing power, like the constitutional requirements of uniformity for "Duties, Imposts and Excises," U.S. Const. Art. I, § 8, cl. 1, and apportionment for "Tax[es]" (other than the income tax), U.S. Const. Art. I, § 9, cl. 4 & Amend. XVI. Those (and other) constitutional limitations merely constrain *how* Congress exercises its granted tax authority. The Export Clause, by contrast, is a straightforward and unyielding "restriction on the power of Congress" that carves one particular economic activity completely out of Congress's power and flatly "disallows *any* attempt to raise federal revenue from exports." *IBM*, 517 U.S. at 848, 859 (emphasis added). Indeed, this Court has unanimously explained that the Clause's unique character as a "direct [and] unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority" by "completely denying to Congress the power to tax exports at all." *U.S. Shoe*, 523 U.S. at 360.

The Framers "fully intended the breadth of scope that is evident in the language." *IBM*, 517 U.S. at 860. The Framers, of course, well understood the federal revenue failings of the Articles of Confederation and the imperative of independent taxing authority for the national government.[8] That makes it

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517 U.S. at 850; see *Cornell v. Coyne*, 192 U.S. 418, 427 (1904); *Turpin v. Burgess*, 117 U.S. 504, 507 (1886); *Pace v. Burgess*, 92 U.S. 372, 375 (1875).

[8] See, *e.g.*, *IBM*, 517 U.S. at 874 (Kennedy, J., dissenting) (citing R. Paul, *Taxation in the United States* 4-5 (1954)); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178 (1796) (Paterson, J.); *The Federalist No. 30* (Alexander Hamilton).

all the more notable that export taxes emerged from the constitutional drafting and ratification process as the one and "only one exception" to that authority, *Fairbank*, 181 U.S. at 296, and were put completely beyond the reach of Congress's affirmative power. See *U.S. Shoe*, 523 U.S. at 368 (noting uniqueness of the Export Clause's preclusion of congressional action); *Fairbank*, 181 U.S. at 292-293.

Fears of regional discrimination in export tax burdens and of the potentially crippling economic consequences of export taxes inspired virulent and unbending opposition, with many members of the Constitutional Convention insisting that empowering Congress to tax exports would be a constitutional deal-breaker and "would shipwreck the whole." 2 Max Farrand, ed., *The Records of the Federal Convention of 1787* ("*Convention Records*") 305 (1937) (Mr. Sherman) (Aug. 16, 1787).[9] Indeed, so unyield-

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[9] See *Hvoslef*, 237 U.S. at 15 (Export Clause "was one of the compromises which entered into and made possible the adoption of the Constitution"); 2 *Convention Records* 359 (Mr. Williamson) (Aug. 21, 1787) (if the legislature were given the power to tax exports, "it would destroy the last hope of an adoption of the plan"); 1 *Convention Records* 592 (July 12, 1787) (General Pinkney expressed "alarm[] when the taxation of exports was mentioned"); 2 *Convention Records* 305 (Aug. 16, 1787) ("Mr. Gerry thought the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it."); *ibid.* ("Mr. Mercer was strenuous against giving Congress power to tax exports. Such taxes were impolitic, as encouraging the raising of articles not meant for exportation."); *id.* at 359 (Mr. Elseworth) (Aug. 21, 1787) ("The taxing of exports would engender incurable jealousies."); *ibid.* (Mr. Gerry) (he "was strenuously opposed to the power over exports * * * [as] [i]t will enable the Genl Govt to oppress the States, as much as Ireland is oppressed by Great Brit-

ing and far-reaching was this opposition that proposals to require a super-majority before taxing exports or to ban them only when imposed for "the purpose of revenue" were defeated. 2 *Convention Records* 359 (Aug. 21, 1787). The Framers thus intended "not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports." *Fairbank*, 181 U.S. at 292-293.[10]

Accordingly, after heated debate, the Framers resolved, as the Constitution's text reflects, that congressional power be "wholly taken away to intermeddle with the subject of exports." Joseph Story, 2 *Commentaries on the Constitution* § 1011 (1833). In that "great point[] the hands of the Legislature were absolutely tied." *Convention Records* 220 (Mr. King) (Aug. 8, 1787). Without that explicit constitutional protection for exports, "the Constitutional Convention would have imploded." Erik M. Jensen, *The Export Clause*, 6 Fla. Tax Rev. 1, 3 (2003).

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ain"); *ibid.* ("Mr. Butler was strenuously opposed to a power over exports; as unjust and alarming to the staple States"); *id.* at 361 (Mr. Sherman) (Aug. 21, 1787) ("It is best to prohibit the National legislature in all cases.").

[10] See *Hylton*, 3 U.S. at 176 (Paterson, J.) ("It was, however, obviously the intention of the framers of the Constitution, that Congress should possess full power over every species of taxable property, *except exports*." (emphasis added)); *id.* at 174 (Chase, J.) ("general power is given to Congress" over taxes "without any restraint, except only on exports") (emphasis added); *id.* at 181 (Iredell, J.) (exports are a "particular exception" to congressional taxing power).

b. The Export Clause's ban on the use of exports as a source of revenue requires monetary compensation for its violation

By its plain terms and historic design, the Export Clause is a constitutional protection against a particular category of monetary exactions and, more specifically, is a textual immunity against Congress's use of the tax power to deprive exporters of money or to use a particular activity – exporting – as a source of federal revenue. That absolute prohibition against both the imposition of the tax and the retention of funds as a source of revenue creates a "fair inference," *White Mountain*, 537 U.S. at 473, that the Export Clause requires the repayment of funds unlawfully exacted. That is because the core nature of an Export Clause claim "seek[s] the return of money paid by [the plaintiff] to the Government," which bespeaks a money-mandating claim. See *Testan*, 424 U.S. at 400; see also *id.* at 401 (where "the plaintiff is * * * suing for money improperly exacted or retained," no further inquiry into money-mandating character is necessary).

This Court's decision in *U.S. Shoe*, moreover, seemed to take as a given that the Export Clause mandates relief for its violation. In determining that the Harbor Maintenance Tax, 26 U.S.C. 4461, violated the Export Clause, this Court expressly held that the Court of International Trade properly exercised jurisdiction under 28 U.S.C. 1581(i). *Id.* at

366.[11] That provision, like the Tucker Act, "is intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provision of law." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980); see also *Humane Soc'y v. Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001). By expressly upholding jurisdiction for monetary relief against the United States in *U.S. Shoe*, this Court thus necessarily assumed – without any noted disagreement by either the Solicitor General or any Justice of this Court – that the Export Clause gives rise to an action for relief. See No. 97-372, U.S. Br., *U.S. Shoe*, *supra* (acceding to jurisdiction).[12]

There was good reason for that lack of objection. The Export Clause prohibits the financial diminishment of exporters' revenues in the same manner that the Judicial Compensation Clause, U.S. Const. Art. III, § 1, protects against the financial diminishment of judicial salaries. And this Court has unanimously expressed "no doubt whatever as to * * * [the jurisdiction] of the District Court" under the Tucker Act over a suit by federal judges alleging the unconstitutional

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[11] Section 1581(i) gives the Court of International Trade exclusive jurisdiction over "any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * revenue from imports or tonnage" and the "administration and enforcement" of such a law. 28 U.S.C. 1581(i)(1) & (4).

[12] The government overreads *U.S. Shoe* when it argues (Br. 32) that this Court expressly foreclosed Tucker Act jurisdiction in a manner that is somehow relevant to this case. This Court explained only that relief under the Tucker Act was unavailable solely because Congress had textually directed that challenges to the tax should proceed through the Court of International Trade. *U.S. Shoe*, 523 U.S. at 365-66 & n.3.

reduction of their salaries. *United States v. Will*, 449 U.S. 200, 210-211 & n.10 (1980).

Indeed, in *United States v. Hatter*, 532 U.S. 557 (2001), this Court exercised jurisdiction over Tucker Act claims challenging the imposition of Social Security *taxes* on judicial salaries. The Court did so, moreover, while acknowledging and without any Justice questioning the court of appeals' underlying jurisdictional ruling that the Judicial Compensation Clause is money-mandating and, thus, that the judges could proceed under the Tucker Act rather than through the administrative tax refund procedure. See *id.* at 564; *Hatter v. United States*, 953 F.2d 626, 628 (Fed. Cir. 1992); see also No. 99-1978, J.A. 36, *Hatter*, *supra* (complaint notes that several of the judges had not filed administrative refund claims).[13]

While those decisions did not address the precise jurisdictional question at issue here, the specific consideration of jurisdiction in *U.S. Shoe* and *Will* and the assumption of Tucker Act jurisdiction in *Hatter* constitute a pattern of jurisdictional exercise that cannot be disregarded lightly.[14]

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[13] In *Hatter*, the Solicitor General abandoned before this Court the argument it made in the Claims Court and makes here – that a challenge to taxes is not cognizable under the Tucker Act and has to proceed through the administrative tax refund procedure. See *Hatter v. United States*, 21 Cl. Ct. 786, 788-789 (1990), rev'd, 953 F.2d 626 (Fed. Cir. 1992).

[14] See *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (plurality) (Court should not "disregard the implications of an exercise of judicial authority assumed to be proper in previous cases."); *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962).

Like the Judicial Compensation Clause and the Takings Clause, the Export Clause protects a purely pecuniary and economic interest in "mandatory and unconditional terms." *Hatter*, 953 F.2d at 628.[15] A critical function of the Export Clause, moreover, is to "disallow[] *any* attempt to raise federal revenue from exports," *IBM*, 517 U.S. at 859 (emphasis added), a purpose unique to the Export Clause. That categorical excision of the government's power to exact funds and to use a particular activity as a source of revenue can only be meaningfully enforced if monetary compensation – removal of the unconstitutional tax revenues from the Treasury – is provided for a violation of the Clause.[16] Liability for monetary compensation thus "naturally follows" from the Export Clause's protection against financial diminution by taxation and "furthers the purpose[] of" the Export Clause to wall off exports as a source of revenue. *Mitchell*, 463 U.S. at 226, 227.[17]

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[15] This Court has long held that the Takings Clause provides a substantive cause of action against the United States under the Tucker Act. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974); cf. *Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("[The Tucker Act claim] rested upon the Fifth Amendment. Statutory recognition was not necessary.").

[16] Cf. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990) (if a tax were "beyond the State's power to impose" or "taxpayers were absolutely immune from tax, * * * [t]he State would have had no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress"); *Ward v. Love County*, 253 U.S. 17, 24 (1920) ("no statutory authority was essential to enable or require the county to refund the money" when a tax was unconstitutionally collected in contravention of controlling Supreme Court precedent).

[17] The government stresses (Br. 33) that the Fifth Amendment's Takings Clause and the Judicial Compensation Clause

Indeed, the constitutional history of the Export Clause precludes any suggestion that the Framers intended the Clause to be merely hortatory or that exporters would be helpless to undo the effects of unlawful exactions by obtaining monetary compensation for such transgressions. Southern delegates to the Constitutional Convention were particularly concerned that their exporters would become victims of "targeted duties" because of the South's comparatively smaller population and its status as "the primary exporter of goods, largely textiles, tobacco, and related products." Jensen, *supra*, at 8; see also 2 *Convention Records* 307 (Mr. Gerry). That concern extended beyond the harm caused by the lost tax funds alone and included fears about the potentially

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use the term "compensation," which the Export Clause does not. That is true, but proves nothing. The constitutional question is whether the provision at issue can fairly be understood to mandate monetary relief for a violation, *Mitchell*, 463 U.S. at 218, which is a functional, not a linguistic, inquiry, see *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("the availability of such damages may be inferred"); see also *Bowen v. Massachusetts*, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting) (to create Tucker Act jurisdiction, law need "not, in so many words, mandate damages"). Indeed, there is no question that the Fourteenth Amendment's Due Process Clause compels monetary relief in the particular circumstance of state governmental takings of property, even though the word "compensation" appears nowhere in that constitutional provision. See *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 239 (1897). Moreover, the operative language of the Judicial Compensation Clause is not, as the government argues (Br. 33), the "language requiring the payment of funds from the federal treasury," but the mandatory prohibition of diminishment. See *Will*, 449 U.S. at 18-19; *Hatter*, 953 F.2d at 628. Furthermore, the Takings Clause's "compensation" language makes it less, not more, financially protective than the Export Clause. *U.S. Shoe*, 523 U.S. at 368-369.

devastating economic harm that export taxes could cause by depressing prices in the domestic market for goods the exporters could no longer sell competitively overseas. See James Madison, *Notes of Debates in the Federal Convention of 1787*, at 501 (Mr. Clymer) (Aug. 21, 1787) ("The middle States may apprehend an oppression of their wheat flour, provisions &c. and with more reason, as these articles were exposed to a competition in foreign markets not incident to Tobo. rice &c."). Joseph Story echoed that concern: "The obvious object of these provisions is, to prevent any possibility of applying the power to lay taxes, or regulate commerce, injuriously to the interests of any one state, so as to favour or aid another." 2 *Commentaries on the Constitution*, *supra*, § 1011, at 469-470. "If congress were allowed to lay a duty on exports from any one state," Story warned, "it might unreasonably injure, or even destroy, the staple productions, or common articles of that state." *Ibid.* For that reason, Story concluded that the Export Clause's protection "extends not only to exports, but to the *exporter*." *Id.* § 1012 (emphasis added). "Congress can no more rightfully tax the one, than the other." *Ibid.*

Given (i) how critical the Export Clause's protection was to adoption of the Constitution, (ii) the very specific concern that export taxes not provide a source of revenue for the government, *IBM*, 517 U.S. at 859, and thus not be retained in the federal Treasury, and (iii) the particularized pecuniary interests the Clause was designed to protect *against congressional action*, the Framers would have considered financial compensation to be necessary and, indeed, indispensable to prevent Congress from retaining ex-

port taxes as "federal revenue," *ibid.*, reaping the financial benefits of its own defiance of an explicit and absolute foreclosure of congressional power, and conditioning the exporters' right to remuneration on Congress's good graces. The Framers well knew that "the power to tax involves the power to destroy," *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (Marshall, C.J.), and for that very reason many conditioned their support for the Constitution on jealous protection of exporters against federal taxation. While Justice Holmes later assured that "[t]he power to tax is not the power to destroy while this Court sits," *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting), overruled in part by *Alabama v. King & Boozer*, 314 U.S. 1 (1941), that would be an empty assurance if the victims of congressional defiance of the Constitution could not obtain compensation for the harm caused by a constitutionally forbidden tax. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803) ("Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?").

3. Tax Legislation Cannot Alter the Export Clause's Money-Mandating Character

The United States does not appear to dispute that, at bottom, the Export Clause is money-mandating, because it concedes (Br. 34) that, if there were no statutory tax-refund scheme, "[t]he Export Clause might be enforceable by alternative means under the Tucker Act." The government's argument instead

(see, *e.g.*, Br. 35) is that Congress's enactment of tax *legislation* strips the *constitutional* provision of its fundamentally money-mandating character. That cannot be right.

To begin with, whether a constitutional provision is money-mandating is a question of constitutional law – one for this Court to resolve. See, *e.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("Statutory recognition [i]s not necessary."); see generally *Marbury*, 5 U.S. at 177 ("[I]t is emphatically the province and duty of the judicial department to say what the law is."). Congress cannot change the meaning of the Constitution through legislation. See, *e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 368 (1936). The Export Clause was intended either to have the particular force and effect for which it was adopted, protecting exporters and requiring the removal of unlawfully collected funds from the revenue stream, or to be an unenforceable admonition, the enforcement of which was left entirely in the hands of the Congress the Clause purports to bind. Either way, the Constitution's meaning does not turn on and off as Congress passes and repeals remedial statutes.

That is particularly true when, as here, the constitutional provision at issue is itself a specific negation of congressional authority to act. It would stand the Constitution on its head to conclude that Congress can use its general taxing authority to alter the money-mandating scope or character of a constitutional provision that is itself an explicit exception to

and wholesale denial of legislative authority. See 2 *Commentaries on the Constitution*, *supra*, § 1011 (Congress's power is "wholly taken away to intermeddle with the subject of exports"); see also *Hvoslef*, 237 U.S. at 13 (Export Clause forbids "legislation nominally conforming to the constitutional restriction, but in effect overriding it").

The government relies heavily (Br. 35-38) on this Court's modern hesitation to imply judicially new private rights of action under the Constitution pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See, *e.g.*, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007). But that mixes apples and oranges. The question under *Bivens* is whether the Court should reach out as a "common-law tribunal" and, without any specific congressional direction, craft a tort remedy against individual federal officials in their personal capacities that evades long-established sovereign immunity principles and triggers sensitive separation-of-powers concerns. See *Wilkie*, 127 S. Ct. at 2598, 2600. Moreover, under *Bivens*, the Court takes such a step based on nothing more than an instrumental hunch (for which the judiciary is not particularly well-suited) about the effective deterrence of government officials, combined with a very "general" assignment of jurisdiction to decide cases arising under the Constitution, see 28 U.S.C. 1331, that itself gives no signal that Congress intended any remedial litigation against the government or government officials. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001); see *Wilkie*, 127 S. Ct. at 2598.

Here, the question is altogether different. In the Tucker Act, 28 U.S.C. 1346(a)(2) & 1491(a), Congress has already made the judgment that federal courts should adjudicate claims against the United States for damages arising from money-mandating provisions of the Constitution. Congress has picked the defendant – the United States – and has waived the United States' sovereign immunity from suit and assigned jurisdiction to the federal courts. Accordingly, Congress has specifically charged the federal courts with determining, for purposes of Tucker Act jurisdiction, whether a constitutional provision is money-mandating – a straightforward question of constitutional interpretation for which the judiciary is uniquely well-suited. See *Marbury v. Madison*, *supra*. Congress having done so, the "federal courts have a 'virtually unflagging obligation * * * to exercise the jurisdiction given them,'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), and "must be careful not to assume the authority to narrow the waiver that Congress intended, or construe the waiver unduly restrictively," *Bowen v. City of New York*, 476 U.S. 467, 479 (1986).[18]

Bush v. Lucas, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), are of no help to the government (see Pet. Br. 36-37). In those cases, the Court declined, in the absence of any legislative di-

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[18] By the same token, the fact that this Court is equally reluctant to imply statutory causes of action, see *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), had no bearing on the Court's separate determination that a statute need only create a "fair inference" that monetary relief is available to trigger Tucker Act jurisdiction, *White Mountain*, 537 U.S. at 472-473.

rection, to infer a *Bivens* remedy that would have conflicted with a pre-existing statutory remedy. See *Schweiker*, 487 U.S. at 423-425 (social security claims); *Lucas*, 462 U.S. at 388-388 (federal employee grievances). Here, by contrast, the court of appeals simply followed Congress's statutory command and undertook the question of constitutional interpretation statutorily assigned to it, attaching to its determination that the Export Clause is money-mandating only the jurisdictional consequences that Congress itself specifically prescribed in 28 U.S.C. 1491(a).

Chilicky and *Lucas* are particularly inapt for a second reason. Those cases each found "special factors counseling hesitation" in the creation of a *Bivens* remedy, *Chilicky*, 487 U.S. at 423; *Lucas*, 462 U.S. at 377, due to Congress's unique competence and expertise in crafting a remedial scheme for the particular claims at issue. But when it comes to claims enforcing the Export Clause – particularly claims where the unconstitutionality of Congress's action is so patent that the government makes no effort to defend it – Congress lacks any relevant expertise or competence and, in fact, has proven its disinclination, and perhaps even its institutional inability, to police categorical prohibitions on its own power. Instead, throughout the Nation's history, it has been this Court that "has strictly enforced the Export Clause's prohibition against federal taxation of goods in export," *IBM*, 517 U.S. at 849, against congressional incursion. See *U.S. Shoe*; *IBM*; *Thames & Mersey*; *Hvoslef; Fairbank*. Where, as here, the Constitution specifically and comprehensively disarms Congress from acting, "special factors counsel[] hesitation," *Lu-*

cas, 462 U.S. at 377, in permitting Congress to divert challenges to its facially unconstitutional actions away from the Tucker Act's established remedial scheme for violations of money-mandating constitutional prohibitions, and into a taxing scheme that is predicated on the very regulatory tax power that the Export Clause expressly rejects. In short, the existence of a refund scheme enacted as part of the taxing power that Congress *does* possess cannot change the money-mandating character of a constitutional provision defining the taxing power that Congress *does not* possess.

B. The Tucker Act Remedy Has Not Been Withdrawn And Is The Remedial Scheme That Best Enforces The Export Clause

1. The Tucker Act Remedy Has Not Been Clearly Withdrawn

When, as here, the Tucker Act is available to enforce a constitutional provision, this Court requires Congress to express "an unambiguous intention to withdraw the Tucker Act remedy." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984). The statute must manifest the "clear and unmistakable congressional intent [that is] necessary to withdraw Tucker Act coverage." *Preseault v. ICC*, 494 U.S. 1, 14 (1990); cf. *Whitman v. Department of Transp.*, 126 S. Ct. 2014, 2015 (2006).

The administrative refund scheme does not expressly or unambiguously withdraw Tucker Act jurisdiction over Export Clause claims. Instead, the government argues that the administrative refund scheme is mandatory because it is a more "finely re-

ticulated" regime (Br. 7, 8, 13, 25) than the Tucker Act. That is incorrect on three levels.

To begin with, this Court's most recent decisions have twice denominated those provisions the type of "general" remedial provisions that are themselves displaced by statutory schemes that have been specifically tailored to a particular type of tax claim, similar to the Tucker Act's unique capacity to vindicate the Export Claus's *sui generis* substantive constraint on congressional tax power. See *Hinck v. United States*, 127 S. Ct. 2011, 2016-17 (2007); *EC Term of Years Trust v. United States*, 127 S. Ct. 1763, 1766-68 (2007).

In addition, the rule that the more general statute is preempted is not iron-clad and only applies "in most contexts." *Hinck*, 127 S. Ct. at 2015. When, as here, Congress has indisputably transgressed an express and unqualified preclusion of its own power, there is "a good countervailing reason" for "[r]esisting the force of" an alternative remedial scheme that was specifically designed to protect the very type of revenue interest that the Export Clause rejects. *EC Term of Years*, 127 S. Ct. at 1767.

Finally, and in any event, the question is not, as the government assumes, which statutory regime has the largest number of rules. It is which statutory provision is "better-fitted" to resolve the type of claim at issue, *EC Term of Years*, 127 S. Ct. at 1767, and whether "special considerations required different treatment" for the claim, *United States v. A.S. Kreider Co.*, 313 U.S. 443, 447 (1941). See also *Amell v. United States*, 384 U.S. 158, 159, 165-166 (1966) (contractual claims asserted by government maritime

workers could be prosecuted under the Tucker Act rather than the Suits in Admiralty Act, which "provides only two years for claimants to file suit, and also requires exhaustion of administrative remedies," because the claims were more akin to civil servants' claims than to maritime claims). Resolution of that question "should go in the direction of constitutional policy." *Regional Rail Reorganizaton Act Cases*, 419 U.S. 102, 133 (1974).

The Tucker Act suit is better designed to enforce the Export Clause and is the remedial route Congress most likely intended, for two reasons. First, there is substantial constitutional doubt about Congress's authority to carve Export Clause claims out of the Tucker Act and impose unique constraints and limitations on their vindication as part of Congress's general authority to regulate tax litigation, and the statute should be construed to avoid that constitutional question.[19] Second, Congress did not clearly express its intent to displace the Tucker Act remedy for this unique type of constitutional claim, particularly where the taxing provision is facially and indisputably unconstitutional.

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[19] See *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (Where "an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'" this Court "is obligated to construe the statute to avoid such problems.") (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)).

2. *Congress's Power to Impose Its Administrative Tax Scheme on Export Clause Claims Is Constitutionally Doubtful*

The government asserts time and again that the administrative tax refund scheme should control because its procedures were deliberately crafted and "uniquely tailored" (Br. 7) by Congress to constrain tax challenges in a way that protects the government's interests in revenue collection and "fiscal planning" (Br. 40; see *id.* at 24, 38-39). But that is exactly the problem. That government-protective approach to tax controversies may be all well and good for challenges to taxes that at least arguably fall within Congress's otherwise plenary taxing authority. The government, however, identifies no basis for imputing to Congress the constitutionally dubious intention to extend its confessedly pro-government and "revenue-protective" process, *Hibbs v. Winn*, 542 U.S. 88, 104 (2004), into areas that the Constitution specifically walls off from congressional tax authority and revenue usage.[20]

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[20] See *Snyder v. Marks*, 109 U.S. 189, 194 (1883) (noting that the tax refund scheme is a "system of corrective justice" with "stringent measures" designed to protect revenue); *Brennan v. Southwest Airlines Co.*, 134 F.3d 1405, 1411 (9th Cir.) (purpose of Section 7422 is to "protect the Treasury"), as amended, 140 F.3d 849 (1998); Press Release, The White House, Office of the Press Secretary (Jan. 31, 1996), reprinted in Tax Analysts, *Administration Urges Treasury to Study Changes for Refund Limitations Cases*, Tax Notes Today, Feb. 2, 1996 (President acknowledges that the refund scheme's time limitations "at times may produce harsh results"); see generally Kristy M. Bowden, *Protective Claims for Refund: Protecting the Interests of Taxpayers and the IRS*, 56 Me. L. Rev. 149 (2004) (discussing complexities in the operation of the administrative refund scheme, in-

No doubt, the Necessary and Proper Clause empowers Congress to establish administrative and judicial procedures and to otherwise "use all proper and suitable means, not specially prohibited, in the raising and disbursement of the revenue." *M'Culloch*, 17 U.S. at 324.[21] The problem here is that sweeping export taxes within the general taxing authority is "specially prohibited," and the end of raising revenue through export taxation is *not* "legitimate," is not "within the scope of the constitution," and does not "consist with the letter," let alone, the "spirit," of the Constitution's careful insulation of exports from Congress's taxing power. *Id.* at 324, 421. Congress's general taxing authority thus does not empower it to erect tax-specific procedural barriers to enforcement of the Export Clause's explicit preclusion of congressional tax power.

Nor does the Export Clause vest Congress with the authority to impose pro-government and revenue-protective administrative procedures on export tax challenges. In fact, it does the opposite. This Court

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cluding unpublished procedures, that result in denials of refunds to diligent taxpayers); see *id.* at 152 (in one context, "courts are finding that the only option available to the taxpayer to maintain their right to a refund was to follow a procedure that does not exist in the Internal Revenue Code or in its regulations").

[21] See *Snyder*, 109 U.S. at 194 (tax recovery scheme was "enacted under the right belonging to the government to prescribe the conditions on which it would subject itself" to suit "in the collection of its revenues"); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (the constitutional power to impose and collect revenue includes the power to identify procedures for presenting "any conflict which might arise" and "to prescribe the manner of trial" for its resolution).

has twice explained that, just as affirmative grants of power to Congress should be "construed as to give full efficacy to those powers," the Export Clause's explicit restriction on congressional power should "in like manner * * * be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed." *Hvoslef*, 237 U.S. at 15; *Fairbank*, 181 U.S. at 290. Indeed, "[i]t would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed." *Fairbank*, 181 U.S. at 289. Accordingly, the specificity of the Export Clause overrides any authority otherwise granted by the general words of the other taxing clauses or the Necessary and Proper Clause, and limits Congress to the enactment of measures that give effect to, rather than undermine or nullify, the Export Clause's "simple, direct, [and] unqualified prohibition." *U.S. Shoe*, 523 U.S. at 368.[22]

History confirms that the Export Clause sweeps broadly and proscribes regulating exports and exporters through the tax system. See *IBM*, 517 U.S. at 859 (Export Clause "specifically prohibits Congress from regulating" exports through exercises of the tax power). The Framers specifically considered and re-

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[22] Congress, accordingly, can provide an administrative refund scheme as an optional means for exporters to vindicate their Export Clause claims without having to initiate judicial action, and the Companies in this case, in fact, availed themselves of that opportunity with respect to the latest three years the export taxes were imposed. Pet. 4; Pet. App. 3a.

jected an amendment that would have limited the Export Clause's prohibition to taxes imposed "for the purpose of revenue." 2 *Convention Records*, *supra*, 359 (Aug. 21, 1787). As this Court explained in *Fairbank*, that reveals that the Export Clause excludes exports "not merely * * * [as] a source of revenue," but from subjection to Congress's regulatory tax power in any manner and for any purpose. 181 U.S. at 292; see *id.* at 293 (history of the Clause requires that the "national government should put nothing in the way of burden upon such exports").

While the Tucker Act would give the Export Clause the same full and fair opportunity for vindication that other constitutional damages claims against the United States receive, the administrative tax refund scheme would obstruct and substantially undermine, rather than carry into effect, the Export Clause's comprehensive withdrawal of congressional tax power.

First, and at the most elemental level, the refund scheme's revenue-protective model stands in diametrical opposition to the Export Clause's simple and straightforward command "disallow[ing] *any* attempt to raise federal revenue from exports." *IBM*, 517 U.S. at 848, 859 (emphasis added). While the financial impact of proceeding under a revenue-protective scheme, with its built-in time lag for the government's interest (see Pet. Br. 24) and risks of procedural bar, see 26 C.F.R. 301.6402-2, may or may not be significant in any given case, "[t]he question of power is not to be determined by the amount of the burden attempted to be cast." *Fairbank*, 181 U.S. at 291. If Congress has the power to impose minor, tax-

specific constraints on the vindication of Export Clause claims, it equally has the power to impose disabling limitations. Indeed, "[t]he question is never one of amount but one of power," *ibid.*, and the Export Clause leaves no room for Congress to treat export taxes like ordinary taxes, or to use its tax power to regulate exports or exporters.

Second, the refund scheme limits exporters to recovering only the measure of funds that were unconstitutionally exacted. There is no provision for recovering the type of economic damages to business that the Framers were so concerned could result from the taxation of exports. Consequently, exporters would be forced to proceed simultaneously on two different tracks to recover all of their damages for a single constitutional violation. In addition, exporters must wait at least half a year before even initiating suit to vindicate their constitutional rights, limit their damages, and recover their funds, 26 U.S.C. 6532(a)(1), with the government enjoying all the revenue benefits of the prohibited funds and perhaps collecting even more in the interim. Indeed, in the *Ranger Fuel* case, in which the coal export tax was held to be unconstitutional, the IRS failed to act at all on the administrative refund claim, and the government delayed for months after the filing of the complaint, before "tak[ing] no position on the constitutionality of the coal excise tax" and requesting further postponement of the question while the government continued to try and "determine whether to defend the constitutionality of the coal excise tax," U.S. Opp. to Pltfs. Mot. for S. J'ment. at 2, *Ranger Fuel Corp. v. United States*, No. 3:98cv370 (E.D. Va.), and, incidentally,

retained and collected more export taxes. To be sure, some provision is made for interest, but its terms (like the administrative refund scheme itself) are sharply skewed in the government's favor.[23]

There is, moreover, no justification for imposing such limitations on recovery – the net effect of which is to retain export taxes in the federal revenue – or administrative hurdles to relief in Export Clause cases. An agency has no expertise either in questions of constitutional law or in the resolution of the relevant constitutional facts (such as whether the item taxed was in the stream of export commerce or qualifies as a user fee, see, *e.g.*, *U.S. Shoe*, 523 U.S. at 367-69; *Cornell v. Coyne*, 192 U.S. 418, 428 (1904)). In addition, when, as here, Congress made explicit its intent to tax coal exports, see 26 U.S.C. 4221(a), an administrative agency has no authority to declare the law unconstitutional.[24]

In short, rather than help to "enforce[] [the Export Clause] in its spirit and to its entirety, *Fairbank*, 181 U.S. at 289, as the Tucker Act does, the administrative refund scheme would ensure that the government will enjoy some (constitutionally proscribed)

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[23] See 28 U.S.C. 2411 (interest ceases 30 days before refund check is issued); 26 C.F.R. 301.6611-1(g); 26 U.S.C. 6621(a) (tying interest rate to federal short-term rate plus specified percentage points, while sharply lowering the applicable interest rate for corporations).

[24] Cf. *U.S. Shoe*, 523 U.S. at 364 (when constitutionality of tax was challenged, the agency responded "with a form letter" asserting that the tax was a user fee); *Ranger Fuel*, 33 F. Supp. 2d at 467-468 (when presented with Export Clause challenge to the coal tax, the IRS simply took no action for 15 months).

revenue benefits no matter how patently unlawful and indefensible the export tax is.

Third, and to be sure, the Export Clause does not preclude Congress from subjecting exporters' claims to the same general, tax-neutral and revenue-neutral limitations on recovery as other constitutional provisions, such as the Tucker Act's six-year statute of limitations. See 28 U.S.C. 2501. See *Block v. North Dakota*, 461 U.S. 273, 292 (1983) ("A constitutional claim can become time-barred just as any other claim can."). But the question here is quite different: whether, having established a tax-neutral procedure for the litigation of damages claims arising under the Constitution, Congress may carve the Export Clause out for "less liberal[]" treatment (Pet. Br. 27), imposing singularly pro-revenue and government-protective burdens and limitations on that Clause's constitutional enforcement, thereby treating that prohibitory Clause as though it were as amenable to regulation through the general tax scheme as claims under constitutional provisions that *grant* Congress taxing power. See *Spalding*, 262 U.S. at 70 (Export Clause gives exports "liberal protection").

Congress cannot. "[D]oing what the Constitution permits gives no license to do what it prohibits." *Evans v. Gore*, 253 U.S. 245, 255 (1920), overruled on other grounds, *Hatter*, 532 U.S. at 567-571. Congress's general power to control constitutional litigation against the United States must be exercised consistently with Article I's specific constraints on congressional power, and it cannot impose procedural constraints on judicial review that, in operation, weaken or negate the strict prohibitions of the Export

Clause, any more than it could use its affirmative legislative powers to circumvent the constitutionally prescribed limitations on suspension of the writ of habeas corpus, Art. I, § 9, cl. 2. See *INS v. St. Cyr*, 533 U.S. 289 (2001).

In short, the deliberate design of the administrative tax refund scheme is to protect the government's retention of revenue, to put claims on a timeframe that is comfortable for the government (see Pet. Br. 24), to limit the claims permitted, to restrict the available remedies, and to force individuals to protest tax payments one at a time, return-by-return. While Congress's hands were supposed to be "absolutely tied" by the Export Clause, *IBM*, 517 U.S. at 860 (quoting 2 *Convention Records*, *supra*, at 220), forcing all Export Clause claims through that administrative process would untie Congress's hands and transform a comprehensive preclusion of congressional power into little more than a borrowing program. The government could take all the revenue it wants from export taxes and obtain "all the beneficial use of the fund[s]," subject only to the obligation to pay back those funds – but no damages and limited interest – months or years later, as refund claims are processed piecemeal, year by year, within whatever framework of restrictions, stringent limitations, and constraints Congress might choose to impose. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-164 (1980).[25] At the same time, the failure of the exporter

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[25] See also *Webb's*, 449 U.S. at 162 ("[I]f the [government] were entitled to the interest, its officials would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is

to comply with any of the "procedural requirements on postdeprivation relief" that Congress has broad "freedom to impose" (Pet. Br. 40) could leave all the revenue from that constitutionally unauthorized exaction in the government's hands. It is doubtful that the Framers intended that Congress's general powers under the Constitution would permit such ready circumvention of the Export Clause. "[W]hat cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." *Fairbank*, 181 U.S. at 294.

3. The Design of the Administrative Tax Scheme Does Not Cover Export Clause Claims

This Court, however, need not resolve the substantial constitutional question of whether Congress may impose special, governmentally favorable tax procedures in areas where the Constitution specifically and completely debars Congress from exercising any tax power. That is because the relevant statutory provisions can fairly be read to preserve and prefer the Tucker Act remedy over the Companies' Export Clause claim.

a. An individualized refund scheme does not preclude separate litigation of broad constitutional questions

The administrative refund procedure is designed to handle individualized, as-applied, return-specific

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held; there would be, therefore, a built-in disincentive against distributing the principal to those entitled to it.").

challenges to tax assessments and to determine, on a case-by-case basis whether money should be refunded. See 26 U.S.C. 6511(a) (referring to claims for refund for "an" overpayment); 26 U.S.C. 6511(b)(1) (referencing the filing of "a" claim); 26 U.S.C. 7422(a) (same); 26 U.S.C. 6532(a)(1) ("the claim"). Refund decisions govern only the particular tax return at issue, and may not control the disposition of a return for the same tax filed the next year. *Flora v. United States*, 362 U.S. 145, 193 & n.16 (1960); *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 778, 780-781 (1974) (Blackmun, J., dissenting). Nor do such individualized administrative refund procedures have the capacity to establish broadly applicable rulings about the scope of congressional taxing power. Instead, the IRS administrative scheme is designed to address factual and technical compliance issues, resolved by auditors in local district offices, who generally lack the authority or legal training needed to resolve such constitutional questions.[26] (Br. 24 (noting that the

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[26] See generally 26 C.F.R. 601.105(e). The original review of excise claims "is a primary function of examiners in the Examination Division of the office of each district director." 26 C.F.R. 601.105(b)(1). "[S]ubstantially the same procedure is followed * * * as when taxpayers' returns are originally examined." 26 C.F.R. 601.105(e)(2). The review generally focuses on highly technical matters. See Audit Technique Guide for the Coal Tax (May, 2005), available at, http://www.irs.gov/businesses/small/article/0,,id=139335,00.html. Technical advice can be obtained from the National Office on "technical or procedural" subjects, but it is given only for specific cases and never to a general class of cases. 26 C.F.R. 601.105(b)(5)(i)(a), (ii)(b) & (viii)(a). Appeal to a regional office is available, but "the appeal procedures do not extend to cases involving solely the failure or refusal to comply with the tax laws because of * * * constitutional * * * grounds." 26 C.F.R. 601.106(b).

purpose of the administrative scheme is to provide "specific facts" that allow the IRS to conduct "an administrative investigation" of a taxpayer's claim))

Beyond that, even if the IRS agreed that Congress had exceeded its power, the most it could do is grant refunds one at a time as a matter of enforcement discretion – and the authority to do even that in advance of judicial invalidation of the tax is debatable when, as here, Congress specifically directed that coal exports be taxed and the money is already in the Treasury. Cf. U.S. Const. Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); *OPM v. Richmond*, 496 U.S. 414, 428 (1990). In any event, any such administrative decisions would offer no protection against the continuing legal obligation to pay the taxes, the need to expend time and resources repeatedly paying them and then pursuing the refund process, the lost time-value of the money, or the risk of a change in agency position.

In an analogous context, this Court unanimously held in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), that the need to ensure judicial review of "substantial statutory and constitutional challenges" to an agency program, *id.* at 680, strongly counseled against interpreting a "reticulated statutory scheme" for review of individual social security benefit determinations as foreclosing federal court jurisdiction over a challenge to the legality of an agency regulation itself, *id.* at 675. See also *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-94 (1991) (jurisdictional limitation on review of "a determination respecting an application" for im-

migration status does not bar review under general federal question jurisdiction statute, 28 U.S.C. 1331, of a constitutional challenge to "a group of decisions or a practice or procedure employed in making decisions"). Likewise here, it is doubtful that Congress intended the individualized administrative refund procedure either to decide or to preclude definitive judicial resolution of facial and far-reaching challenges going to the core of Congress's constitutional taxing power. Indeed, "there would be a serious question about the reasonableness of a system that forced a [taxpayer] to bring a series of backward-looking refund suits to establish repeatedly the legality of [a] claim." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 748 n.22 (1974).

b. Congress has not intended revenue-protective procedural constraints to apply to taxes that are, on their face, unconstitutional

Even with respect to exercises of recognized taxing authority, this Court had repeatedly held that broadly worded statutory restrictions on taxpayers' prosecution of such claims do not apply when the challenged tax unquestionably falls beyond Congress's authority. In *Enochs v. Williams Packing & Navigation Company*, 370 U. S. 1 (1962), this Court addressed the Tax Injunction Act's sweeping command that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," 26 U.S.C. 7421(a). Although the Act's "language could scarcely be more explicit," *Bob Jones*, 416 U.S. at 736, this Court held that the Act does not apply to taxes that are so wholly without

foundation that "it is clear that under no circumstances could the Government ultimately prevail." *Enochs*, 370 U.S. at 7; see *South Carolina v. Regan*, 465 U.S. 367, 374 (1984).

Accordingly, when, "under the most liberal view of the law and facts, the United States cannot establish its claim," and the government itself does not "claim that [the tax] is valid," *Enochs*, 370 U.S. at 7-8, the Court has concluded that permitting a taxpayer suit to go forward outside traditional limitations on taxpayer litigation cannot affect any legitimate governmental interest in tax collection, *Commissioner v. Shapiro*, 424 U.S. 614, 628 (1976). Cf. *United States v. Janis*, 428 U.S. 433, 441-442 (1976) (holding that "the usual rule with respect to the burden of proof in tax cases" does not apply "where the assessment is shown to be naked and without any foundation"). Rather, when the tax is, on its face, in excess of the power granted to the Congress by the Constitution, the assessment is, in the eyes of the law, only "in the guise of a tax," *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936), and may be procedurally treated as such.[27]

By the same token, statutorily mandated exhaustion requirements generally do not apply when a

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[27] The question whether the government has any chance of ultimately prevailing "is to be determined on the basis of the information available to it at the time of the suit." *Shapiro*, 424 U.S. at 627. This type of injunction was not an available remedy for the Companies here, however, because the plaintiff still must establish irreparable harm, *ibid.*, which an ongoing obligation to pay money generally does not establish. See, *e.g.*, *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975); *Bob Jones*, 416 U.S. at 745.

party seeks to enjoin agency action that is "in excess of its delegated powers and contrary to a specific prohibition" in the law, where that prohibition is "clear and mandatory." *Leedom v. Kyne*, 358 U.S. 184, 188 (1958). That is so because, when government officials act in plain and undisputed violation of direct and unqualified prohibitions on their authority – whether those directives are rooted in statute or the Constitution – the central rationale for exhaustion collapses. The agency can claim neither expertise nor efficiency when it acts wholly outside its lawful bounds, and, by definition, factfinding has little relevance to halting violations of the law that are plain on their face.[28] At the same time, when the Political Branches are heedless of or defy a "simple, direct, unqualified [constitutional] prohibition" on their authority, *U.S. Shoe*, 523 U.S. at 368, the need for direct judicial intervention reaches its apex.[29]

Accordingly, before forcing the Companies to litigate within the administrative tax refund framework, with its revenue-protective procedures, Congress likely intended that that the tax at issue would have

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[28] See *Thetford Properties IV Ltd. v. Department of Housing and Urban Dev.*, 907 F.2d 445, 448-449 (4th Cir. 1990) ("Of course, in the rare case when a statute is patently unconstitutional or an agency has taken a clearly unconstitutional position, exhaustion may not be required."); *Grutka v. Barbour*, 549 F.2d 5, 8 (7th Cir.) ("the *raison d'etre* of the exhaustion doctrine[] [is] simply irrelevant when the Board has clearly breached the bounds of its proper authority as a matter of law," and the violation is plain because the statute is unconstitutional on its face), cert. denied, 431 U.S. 908 (1977).

[29] See Black Lung Benefits Revenue Act of 1977, H.R. Rep. No. 438, 95th Cong., 1st Sess. 73 (1977) (explaining that the usual exemption for "exports" will not "apply to this coal tax").

at least a colorable claim to validity and thus could, with some legitimacy, be defended as a "tax" as Congress employed that term in the statutory refund provisions. In this case, however, the government was unable, even after a year of study, to muster any constitutional defense for the export tax, and the district court was unable to discern any justification for it either. *Ranger Fuel*, 33 F. Supp. 2d at 469. There is no question that a tax used to impose a prior restraint on speech may be enjoined as foreclosed by the Constitution, see *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean*, 297 U.S. at 250, without imposition or exhaustion of six-month-long, revenue-protective procedures, cf. *Near v. Minnesota*, 283 U.S. 697 (1931). So likewise may a facially unconstitutional export tax – a tax that was also of substantial concern to the Founders – be challenged through the ordinary mechanism for constitutional litigation, without any procedural thumb on the government's side of the scale. At a minimum, the Court should require a clear statement of congressional intent to insulate such facially unconstitutional measures from ordinary judicial review.[30]

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[30] The Government's reliance (Br. 16) on the requirement of a *pre-payment* protest in *United States v. New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906), is misplaced for three reasons. First, that case involved a Tucker Act claim "founded" upon a statute, not (as the Government asserts (Br. 16)) "an Export Clause claim under the Tucker Act." See No. 116, Resp. Br. 15, *Cuba Mail*, *supra* ("This action [is] based upon the act of May 12, 1900."); *id.* at 18 ("[T]he petitioner may therefore enforce by an action under the Tucker Act the right given it by the Act of May 12, 1900."); *Hvoslef*, 237 U.S. at 7 (the claims in both

c. The statutory text is ambiguous

The administrative refund statutes, by their terms, do not naturally embrace Export Clause challenges to Congress's foundational taxing authority. To begin with, given the straightforward and unqualified constitutional prohibition on export taxes and the fact that, by definition, the *ad valorem* tax at issue here was imposed on exported coal when it was already in the stream of international commerce, it is far from clear that the coal tax constitutes an "internal" revenue tax, within the meaning of 26 U.S.C.

Hvoslef and *Cuba Mail*, *see id.* at 9, were "based upon" refund statutes). The plaintiffs in both cases raised the Export Clause simply to satisfy the statutory element of proof of an "erroneous or illegal assessment and collection." *Hvoslef*, 237 U.S. at 7; *Cuba Mail*, 200 U.S. at 494-495; No. 116 Resp. Br. 18, *Cuba Mail*, *supra*. Thus, at most, *Cuba Mail* "stands for the unremarkable proposition that a taxpayer suing to recover under a refund statute must satisfy all the requirements attendant to that statute." *Cyprus Amax*, 205 F.3d at 1375. Second, *Cuba Mail* did not address any jurisdictional questions under the recently enacted Tucker Act and, indeed, this Court later explained that jurisdiction was assumed in that case. See *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915). Tellingly, the Court gave no indication that, if a pre-payment protest were not an element of the cause of action, there would have been any jurisdictional problem with proceeding under the Tucker Act, notwithstanding the existence of the separate, *post hoc* administrative refund provisions. Third, no question of Congress's authority to impose procedural constraints on Export Clause challenges was involved. The long-since abandoned requirement of a protest at the time of payment, see Revenue Act of 1924, ch. 234, § 1014, 43 Stat. 253, 343, was the product of judge-made common law, not statute, defining the elements of a common-law tort claim for recovery against a collector in his personal capacity. See *United States v. Kales*, 314 U.S. 186, 198 (1941).

6532(a)(1) and 7422(a). Compare *Black's Law Dictionary* 732 (5th ed. 1979) (defining "internal revenue" as "revenues from internal sources by way of taxes as contrasted with revenues from customs and foreign sources"), with *U.S. Shoe*, 523 U.S. at 365-366 (explaining how an export tax could be understood to fall under a statutory reference to "imports" and thus could be considered a "customs duty"); see also 28 U.S.C. 1340 (establishing district court jurisdiction over claims arising under any Act of Congress "providing for internal revenue" *or* "revenue from imports"); *Canton R.R. Co. v. Rogan*, 340 U.S. 511, 515 (1951) (export "acts begin and end at water's edge"); *Dooley v. United States*, 183 U.S. 151, 153-155 (1901) (discussing the foreign commerce aspect of exports).[31]

In addition, Congress's use of the terms "credit" or "refund" in defining the type of claims that are subject to its tax refund scheme, 26 U.S.C. 6511(a) & (b), 7422(a), can naturally be read to presuppose some colorable claim of authority to have collected the money in the first instance. Where, by contrast, money is taken in the complete absence of any lawful authority – for example, if an IRS agent picks a taxpayer's pocket during an audit – the monetary relief sought would not commonly be described as a "tax refund."[32]

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[31] The fact that the underlying tax provision is codified in Title 26, by itself, does not make it an "internal revenue tax," as the government itself argued in *U.S. Shoe*. See 523 U.S. at 367.

[32] See *United States v. State Bank*, 96 U.S. (6 Otto) 30, 36 (1877) (recognizing "implied contract" claim "where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud" by a Treasury official); see also *Bonwit Teller & Co. v. United States*, 283 U.S. 258, 265 (1931)

Congress's reference to "any" recovery of internal revenue taxes does not help the government. This Court has held that, in the absence of clearer congressional direction, the word "any" should not be read to sweep in questionable and legally sensitive applications "that Congress likely did not consider." *Small v. United States*, 544 U.S. 385, 390 (2005). Instead, "general words" like "'any'" must "be limited" in their application "to those objects to which the legislature intended to apply them." *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.).[33]

d. The Export Clause exception to the administrative refund scheme is narrow and tightly cabined

The government argues (Pet. 25; Br. 28 n.7) that permitting Export Clause claims to proceed under the Tucker Act will permit taxpayers to circumvent the administrative tax refund scheme by alleging any constitutional defect in a tax. The short answer is that this Court – speaking unanimously – had no trouble understanding that the *sui generis* nature of the Export Clause's "simple, direct, unqualified prohibition * * * distinguishes it from other constitutional limitations on governmental taxing authority."

(recovery of overpayment of taxes allowed by the Commissioner through an "accounts stated" action is not barred by refund procedure's limitations period).

[33] See also *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004) ("'any'" means "different things depending upon the setting"); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) ("[R]espondent errs in placing dispositive weight on the broad statutory reference to 'any' law enforcement officer * * * without considering the rest of the statute.").

U.S. Shoe, 523 U.S. at 368. Moreover, Congress's general ban on the imposition of manufacturers' excise taxes on exports, see 26 U.S.C. 4221(a), should ensure that few Export Clause challenges will arise in the future.

Beyond that, only those constitutional provisions that are independently deemed to be money-mandating will support Tucker Act jurisdiction. *Testan*, 424 U.S. at 398. While that class includes export taxes, this Court's recent confirmation that the Export Clause means what it says, see *U.S. Shoe*, *supra*, and *IBM*, *supra* – and the fact that only a small handful of Export Clause cases have arisen since 1787 anyhow – strongly suggests that Tucker Act jurisdiction over Export Clause claims will have no discernible impact on the administrative tax refund process. The Takings Clause is also money-mandating, *Regional Rail*, 419 U.S. at 126, but that has no relevance here because "taxation for a public purpose, however great," is not a "taking of private property." *Mobile County v. Kimball*, 102 U.S. (12 Otto) 691, 703 (1880). Finally, following this Court's decision in *Hatter*, the Judicial Compensation Clause will only give rise to a constitutional claim if Congress imposes a discriminatory tax on judges' compensation, see 532 U.S. at 567, 571, which would presumably be a rare event.[34]

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[34] Nor has the narrow exception to the Tax Injunction Act recognized in *Enochs* for challenges to taxes that lack any colorable legal defense, 370 U.S. at 7-8, led to artful evasion of general limitations on the adjudication of tax claims, presumably because Congress is not in the habit of enacting such measures.

Contrary to the government's argument (Pet. 25), no court has held that either the Direct Tax or Uniformity Clause, U.S. Const. Art. I, § 8, cl. 1 & § 9, cl. 4, is money-mandating, nor would such a decision follow from this case. Those provisions simply regulate how federal taxes that Congress has the power to adopt are to be designed. Neither is the type of absolute preclusion of congressional taxing authority or explicit exclusion of a particular activity from the federal revenue stream that the Export Clause is.

Accordingly, a violation of either provision would not imply that the government had obtained funds that are constitutionally excluded from federal revenue or wholly beyond Congress's authority to collect at all. Instead, such violations may be remedied – and the same money still collected – by adjusting and increasing the coverage of the tax to make it "proportional" or "uniform." In other words, the essence of a taxpayer's claim under the Direct or Uniform Taxation Clauses is not that its funds are completely immunized from taxation and should be disgorged as an illegitimate source of revenue *per se* (as the claim would be under the Export Clause), but that the burden of legitimate tax collection should have been allocated more widely or proportionately. Cf. *McKesson*, 496 U.S. at 39-40 (where a State imposes an unconstitutionally discriminatory tax, it "retains flexibility in responding to this determination," and "may reformulate and enforce the Liquor Tax during the contested tax period," by "assess[ing] and collect[ing] back taxes from petitioner's competitors" or otherwise "calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme").

Moreover, "logic sometimes must defer to history and experience," *United States v. Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring), and the fact that the government's predicted impact on the tax scheme has failed to materialize *at all* in the eight years since the Federal Circuit first held that an Export Clause challenge could proceed under the Tucker Act belies the suggestion that courts are incapable of distinguishing between constitutional limitations on authority granted to Congress and complete and unqualified denials of congressional power to intermeddle with a particular economic activity. Indeed, the government's argument ignores Chief Justice Marshall's admonition in an early tax case not to "treat[] a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 444 (1827); see also *Washington Dep't of Rev. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 749 (1978) (distinguishing between constitutional provisions that "state a prohibition" and those that "merely grant[] specific power to Congress"); *Fairbank*, 181 U.S. at 296 (same as *Brown*).

According distinct status to challenges based on an absolute and unqualified preclusion of congressional power makes sense, moreover. Where Congress has the constitutional power to act, its actions are presumptively constitutional, *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883), and it has the concomitant power to establish reasonable rules and procedures for the review of governmental action, see *Chilicky*, 487 U.S. at 423 (where Congress creates a "Government program," it can "provide[] what it con-

siders adequate remedial mechanisms for constitutional violations that may occur in the course of its administration"). When, however, Congress has no power to act and its authority has been specifically withdrawn by the Constitution, measures adopted in express defiance of that prohibition necessarily dispel any such presumption, and there is no apparent source of authority for Congress to erect specific procedural obstacles to judicial review of that action.

Finally, and in any event, nothing in this case requires the Court to go any further than the exception to ordinary tax litigation and exhaustion principles that this Court already recognized in *Enochs*, *supra*, and *Leedom*, *supra*, for facially unconstitutional and indefensible tax laws. Presumably the government does not contend that constitutionally indefensible laws arise with any frequency or that taxpayers can easily meet that exacting standard for review. Giving the Tucker Act that narrow scope, "it is entirely possible for the Tucker Act and [the tax refund scheme] to co-exist." *Monsanto Co.*, 467 U.S. at 1018. Indeed, "it is the duty of the courts" to give effect to both statutes where, as here, it is possible to do so. *Regional Rail*, 419 U.S. at 133.

C. The Export Clause Claim Falls Within The Plain Terms Of The Interest Statute

The court of appeals' holding that the Companies are entitled to interest is compelled by the plain terms of the interest statute, 28 U.S.C. 2411. As relevant here, Section 2411 provides that "interest shall be allowed" on "*any* judgment of *any* court * * * for *any* overpayment *in respect of* any internal-

revenue tax." (Emphases added.). As enamored as the government is with the sweep of the word "any" in the tax provisions (see Br. 15), its argument ignores that word here, even though in this setting all of the surrounding contextual indicia confirm that Congress meant "any" to signal broad coverage. See *Ali v. Federal Bureau of Prisons*, No. 06-9130, slip op. 5 & n.4 (Jan. 22, 2008) ("any" has expansive meaning where there is "no basis in the text for limiting the phrase" and no "other circumstances * * * counteract the effect of expansive modifiers").

Contrary to the government's argument (Br. 44), Section 2411 is not "an integral part" of the administrative tax scheme. Unlike the provision at issue in *Hinck* – which inextricably combined a "shorter statute of limitations" with "a standard of review" "in the *same* statute," 127 S. Ct. at 2016 – Section 2411 is not even housed in the Internal Revenue Code. Instead, it is located in Title 28, which governs judicial procedure broadly, and is part of a chapter entitled "United States As Party *Generally*," 28 U.S.C. ch. 161 (emphasis added). Moreover, because Section 2411's textually general interest provision was crafted by Congress decades after Congress created the administrative tax refund procedure in 1866, see Revenue Act of 1921, ch. 136, § 1324(b), 42 Stat. 227, 316, Congress plainly did not view that interest provision as part of a single "refund-remedy package" (Pet. Br. 44 n.12).[35]

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[35] When Congress wished to incorporate Internal Revenue Code provisions in Section 2411, it did so explicitly. 28 U.S.C. 2411 (citing the interest calculation provision in 26 U.S.C. 6621).

The government's effort (Br. 43) to limit "overpayment" to the recovery of taxes "erroneously or illegally assessed," as those terms are used in 26 U.S.C. 7422(a), also fails. The government's argument might have fared better in 1921, when the original version of Section 2241 allowed interest only "for any internal-revenue tax erroneously or illegally assessed," see § 1324(b), 42 Stat. at 316 – language that paralleled the contemporaneously passed predecessor to Section 7422(a), see § 1318, 42 Stat. at 314-15. But, in 1928, Congress replaced that narrow language with the modern interest provision, which permits interest more broadly "for any overpayment in respect of any internal-revenue tax." Revenue Act of 1928, Pub. L. No. 70-562, § 615, 45 Stat. 791, 877. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

This Court, moreover, has stressed that "overpayment" should not be construed as "a word of art," *Jones v. Liberty Glass Co.*, 332 U.S. 524, 532 (1947). This Court's decision in *United States v. Dalm*, 494 U.S. 596 (1990), undercuts, rather than aids, the government's position (see Pet. Br. 43). Putting aside that the Court was not interpreting Section 2411 in that case, the Court gave "overpayment" in 26 U.S.C. 6511 the same "commonsense interpretation" that the court of appeals here gave "overpayment" in Section 2411, explaining that it applies "when a taxpayer pays more than is owed, for whatever reason or no reason at all." *Dalm*, 494 U.S. at 609 n.6. While the Court noted in *Dalm* that "overpayment" "encompasses" erroneously, illegally, or wrongfully collected

taxes under Section 7422, *ibid.*, the Court nowhere said that "overpayment" is limited to those situations or, more generally, that the particular procedural vehicle through which a claim is prosecuted has anything to do with whether the claim itself is for an "overpayment."

Indeed, Congress's own definition of "overpayment" belies the government's attempt to narrow it to "erroneously or illegally assessed" tax payments. Congress has specified that earned-income credit in excess of tax liability is an "overpayment," 26 U.S.C. 6401(b)(1), despite the fact that individuals may be eligible for such credit even if *no* tax is "assessed [against] or collected" from them at all. *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 863 (1986) (such "overpayment" occurs "independent of the individual's actually having made any payment").

Finally, as in the Takings Clause, the Export Clause itself requires the payment of interest on export taxes. See *Jacobs*, 290 U.S. at 16.[36] In *Seaboard Air Line Ry. v. United States*, 261 U.S. 299 (1923), this Court explained that the Takings Clause requires the payment of interest, so that "no specific [statutory] command to include interest is necessary." *Id.* at 306. The Court reasoned that the owner whose property was taken "is entitled to the damages inflicted by the taking," and that interest is part of

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[36] Although controlling Federal Circuit precedent precluded the Companies from arguing below that interest was constitutionally required, see Resp. C.A. Br. 8 n.7, this Court can affirm the judgment on any ground supported by the record. *Schenck v. Pro-Choice Network*, 519 U.S. 357, 384 n.12 (1997); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982).

that right to "just compensation safeguarded by the Constitution." *Id.* at 305; see also *Phillips v. Washington Legal Found.*, 524 U.S. 156, 165, 168 (1998) ("interest * * * follows the principal," and "attaches as a property right incident to the ownership of the underlying principal").

By the same token, the Export Clause's specific and unqualified prohibition on the use of exports as a source of tax revenue and insulation of exporters from the task of such revenue generation can only be given effect if Congress is denied the time value of the funds that it has wrongfully collected through export taxes, and the exporter is "put in as good position pecuniarily as he would have been if his property had not been ta[xed]." *Seaboard*, 261 U.S. at 304; see *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (interest might be naturally included when damages claim arises from "the detention of money"). The "present use of * * * money is itself a thing of value," *Procter & Gamble Distributing Co. v. Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924) (Learned Hand, J.), and failure to compensate for it will result, as it did in *Webb's*, 449 U.S. at 163, in an "exaction" that "is a forced contribution to general governmental revenues," contrary to the specific and unqualified command of the Export Clause that exports not provide a source of tax revenue.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

STEVEN H. BECKER
PAUL A. HOROWITZ
SUZANNE I. OFFERMAN
BAKER & MCKENZIE LLP
1114 Avenue of the Americas
New York, NY 10036

PATRICIA A. MILLETT
(Counsel of Record)
THOMAS C. GOLDSTEIN
STEVEN C. WU
MONICA P. SEKHON
AKIN GUMP STRAUSS HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

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No. 07-308

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY AND PREMIER ELKHORN COAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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The text of the controlling statute governs this case. To challenge the coal excise tax that respondents had paid as "erroneously or illegally assessed," respondents were required to file timely refund claims, and to allow the Internal Revenue Service (IRS) time to review those claims. Had respondents taken those steps and not received relief, they could have proceeded to court under the Tucker Act and 26 U.S.C. 7422. But they did not file their refund claims until mid-1999, and accordingly "[n]o suit or proceeding shall be maintained in any court for the recovery of" respondents' taxes with respect to tax years 1996 and before. 26 U.S.C. 7422(a).

Respondents' attempts to avoid the clear import of that plain language are unavailing. No matter how much respondents wish to emphasize the clarity and allegedly distinctive qualities of the Export Clause, a claim under that

Clause remains a claim that the tax was "erroneously or illegally assessed," 26 U.S.C. 7422(a). Congress has not singled out constitutional claims for disfavor, but neither has it exempted them from the requirements that apply to *all* claims for recovery of taxes erroneously or illegally assessed, no matter what the source of the illegality. Instead, Congress has required that respondents proceed according to the single, orderly procedure that the law prescribes—*i.e.*, the tax-refund regime, which offered a fully adequate remedy (including interest) for respondents' Export Clause claim.

Respondents seemed to recognize the applicability of the tax-refund scheme in seeking and receiving a refund for the tax years for which their claims were timely. But as to earlier tax years, respondents contend that the Export Clause guarantees them a second, independent remedy, also under the Tucker Act but without the procedural requirements that expressly apply to all claims for the recovery of taxes. Accepting respondents' contentions would not give a judicial remedy to taxpayers who now lack one, nor would it give a pre-payment remedy to taxpayers who otherwise could proceed only after paying their taxes. Instead, it would serve only to excuse, without warrant, respondents' 21-year failure to assert in any forum a constitutional violation that they now describe (Br. 24, 25, 49) as so "patent" as to render the tax "indefensible" and "facially unconstitutional." Respondents can point to no basis in law for the extraordinary and unprecedented relief they seek, and their untimely claims should be rejected.

A. The Plain Text Of The Internal Revenue Code Forecloses Respondents' Contentions

Although respondents touch on the text of Section 7422(a) only briefly, in a passage buried deep in their brief

(Br. 43-45), the correct answer to the question presented begins and ends with the unambiguous language of that statute: "*No* suit or proceeding shall be maintained in *any* court for the recovery of *any* internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed." 26 U.S.C. 7422(a) (emphases added). Under the only possible reading of that pellucid and explicit text, respondents' suit is barred. Respondents nonetheless urge three grounds for denying that text its clarity, but none is correct.

Respondents assert (Br. 42, 44) that the coal excise tax is not a "tax" within the meaning of Section 7422(a) because the government had no "colorable claim of authority to have collected the money in the first instance." This Court has already rejected that line of argument, because Section 7422(a) applies by its own terms to sums "alleged to have been * * * illegally assessed or collected" as a tax. Construing the word "tax" in a statute that "was *in pari materia* with" the predecessor of Section 7422(a), this Court confirmed that there is "no force in the suggestion that [the statute], in speaking of a 'tax,' means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute." *Snyder* v. *Marks*, 109 U.S. 189, 192 (1883). Rather, even (perhaps especially) an illegal tax is still a tax, and its legality or illegality is to be determined by the process that begins with a timely refund claim.

Respondents also suggest (Br. 43-44) that the coal excise tax is not an "internal revenue" tax. But the dictionary definition that respondents cite confirms that a tax on "coal from mines located in the United States," 26 U.S.C. 4121(a)(1), is an internal revenue tax. Cf., *e.g.*, *Begier* v. *IRS*, 496 U.S. 53, 55, 60 (1990) (treating an excise tax as an "internal revenue tax" for purposes of another tax provision); 26 U.S.C. 5005(c)(1) (same). Respondents offer an

inapposite analogy to the tax invalidated in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) (*U.S. Shoe*), but the Court there did not hold that an unconstitutional "Tax * * * laid on Articles exported" cannot be an internal-revenue tax as the federal statutes use that term. Rather, the Court simply applied an unusual provision of the Harbor Maintenance Tax (HMT) law, directing that the HMT "be treated as if [it] were a customs duty" for jurisdictional purposes. *Id.* at 365 (quoting 26 U.S.C. 4462(f)(2)). Respondents' argument is further belied by the fact that Section 2411—on which they vigorously rely to support their award of interest—applies only to judgments for "overpayment in respect of any *internal-revenue tax*." 28 U.S.C. 2411 (emphasis added). Respondents neglect to explain why the coal tax would be an internal-revenue tax for purposes of Section 2411 but not Section 7422.[1]

Respondents' final textual argument (Br. 45) is that Section 7422(a)'s explicit coverage of all suits for the recovery of "any" internal revenue tax should be read narrowly to avoid "sweep[ing] in questionable and legally sensitive applications." But as this Court recently reemphasized, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5

[1] Respondents' argument would also lead to the absurd result that paying the coal tax did not make them taxpayers for purposes of the Internal Revenue Code, which defines "taxpayer" as "any person subject to any *internal revenue tax*." 26 U.S.C. 7701(14) (emphasis added). And, ironically, it would deprive the federal district courts of jurisdiction under the Tucker Act to hear the very claims that respondents seek to have recognized, because those courts' tax jurisdiction covers only actions "for the recovery of any *internal-revenue tax* alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 1346(a)(1) (emphasis added).

(1997)). Unlike in the cases respondents cite (Br. 45), reading Section 7422(a) to give the word "any" its ordinary meaning will not produce unworkable or anomalous results, extend the statute extraterritorially, or trench upon sovereignty concerns. In the absence of *any* textual or contextual indicator that would "counteract the effect of" the "expansive modifier[]," the word "any" must be given its natural meaning. *Ali*, 128 S. Ct. at 836 n.4; accord *id.* at 844-845 (Kennedy, J., dissenting).

B. No Principle Of Statutory Construction Permits Respondents To Sever The Refund Requirement From The Statutory Framework

Respondents and their amici are altogether incorrect in suggesting that this case requires the Court to choose between applying either the tax-refund regime, on the one hand, *or* the Tucker Act, on the other. The two are in fact inseparable, and the tax-refund procedure does not "withdraw Tucker Act jurisdiction," as respondents mistakenly contend. Br. 25-27. To the contrary, if a taxpayer complies with the requirement of submitting a timely refund claim but does not receive full relief, his remedy is to sue under Section 7422(a) *and the Tucker Act*, which supplies the requisite jurisdiction and waiver of sovereign immunity. Indeed, Section 7422(a) echoes the words of the Tucker Act provision that confers concurrent jurisdiction on the federal district courts. Compare 26 U.S.C. 7422(a), with 28 U.S.C. 1346(a)(1).

This Court recognized as much in *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941). The Court held that a claim may be "brought under" the Tucker Act but still be subject to a shorter statute of limitations than the six-year "outside limit" for Tucker Act claims. *Id.* at 447. The Internal Revenue Code provides several such shorter time

limits, and the Court in *A.S. Kreider* held that the predecessor of current 26 U.S.C. 6532(a)(1), which then applied to "proceedings for the recovery of 'internal-revenue tax alleged to have been erroneously or illegally assessed,'" displaced the Tucker Act's more general six-year limitation period. 313 U.S. at 447-448. There was no repeal by implication, because nothing in the Tucker Act rules out applying less generous procedures to "particular actions which, because of special considerations, require[] different treatment." *Id.* at 447; see U.S. Br. 18-20.

The tax-refund statute predates the Tucker Act (see Resp. Br. 9 n.5), and when it was enacted no court had recognized a cause of action like the one respondents seek. Reading Section 7422(a) to govern that cause of action, if it exists, therefore would not constitute an implied repeal. See *United States* v. *Estate of Romani*, 523 U.S. 517, 529-530 (1998) (presumption against implied repeals inapplicable when prior law did not clearly grant the allegedly repealed right). Rather, Section 7422(a) *grants* a right of action under the Tucker Act, one respondents could have pursued. Thus, the correct inquiry is whether, before invoking Tucker Act jurisdiction, respondents must comply with the plainly written prerequisites and limitations set out in Section 7422(a) and its companion provisions, not just the six-year "outside limit" of 28 U.S.C. 2501. *A.S. Kreider*, 313 U.S. at 447.

Even if the plain language were ambiguous—which it is not—this Court's cases would confirm that the more specific tax-refund procedures control. The "better-fitted" procedure for tax claims requires compliance with Section 7422(a), and the associated time limits, before permitting a suit under the Tucker Act. *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007); see U.S. Br. 20-26. The tax-refund procedure can provide complete relief; the

requirement to present an administrative claim favors resolution of disputes without litigation where possible; and the shorter limitation period serves the "congressional objective [of] providing the Government with strong statutory protection against stale demands." *United States* v. *Brockamp*, 519 U.S. 347, 353 (1997) (internal quotation marks and citation omitted). Respondents offer no "good countervailing reason," *EC Term of Years*, 127 S. Ct. at 1767, why Congress would have intended to permit their challenge, and theirs alone, to proceed under the catchall provisions of the Tucker Act without first complying with the tax-specific procedures carefully set out, and expressly made exclusive, in Title 26.[2]

C. The Tax-Refund Procedure Is Fully Applicable To Constitutional Claims

Respondents also advance the notion (Br. 32-34) that the refund procedure serves no legitimate function and provides no adequate redress in Export Clause cases. That contention is without merit. The tax-refund procedure is based on sound policy considerations that apply equally—and neutrally—to Export Clause claims, to other constitutional claims, and to other grounds for challenging the va-

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[2] Amicus Alliance Coal suggests (Br. 10-20) that this Court has recognized such exceptions for other taxes, but the cases it cites are inapposite. In several, the taxpayer *did* submit a claim or its equivalent. See *Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, 261-262, 264-265 (1931); *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 31 (1915); *United States* v. *Finch*, 201 F. 95, 96 (7th Cir. 1912). *Dooley* v. *United States*, 182 U.S. 222 (1901), concerned a customs duty, not an internal revenue tax, and Section 7422's predecessor was irrelevant. And in *South Carolina* v. *United States*, 199 U.S. 437 (1905), this Court mentioned the tax-refund procedure but did not analyze it at all. Several of Alliance's remaining cases merely distinguish between suing the United States and suing the collector. That distinction no longer exists. See 26 U.S.C. 7422(f)(1).

lidity of a tax. There is no policy-based justification for ignoring the plain statutory direction that all efforts to recoup an illegally assessed tax must proceed in compliance with the tax-refund framework.

1. The tax-refund procedure has been repeatedly upheld as an appropriate way to preserve the taxpayer's right to an adequate remedy for any incorrect assessment while protecting the government's interest in the orderly administration of the revenue laws and narrowing the scope of any dispute to be litigated. See U.S. Br. 24. Each of those considerations applies with full force to the coal excise tax, and respondents' contention that their Export Clause claims are uniquely unsuitable for the tax-refund procedure is unavailing.

First, much of respondents' argument proceeds on the premise that export taxes are as unmistakably prohibited by the Constitution as a 33-year-old President. But although the prohibition on export taxes is clear enough, what constitutes an export tax in particular circumstances can be a fact-bound question that the tax-refund procedure can usefully clarify. In the coal-tax context, for example, the validity of an Export Clause objection turns in large part on facts such as whether the coal is in the stream of export when sold by the producer. That determination is quite specialized, and IRS coal-industry specialists review claims to ensure consistent treatment of the associated technical issues. See, *e.g.*, I.R.S. Tech. Adv. Mem. 200417005 (Apr. 23, 2004). Coal may properly be subject to the excise tax even if it is ultimately exported, if it is not in the stream of export when first sold. See *ibid.* (coal producer sought refund of excise tax on all coal sold to a domestic broker, but conceded that some coal was stockpiled and therefore not in the stream of export). And, of course, most domestically produced coal is not exported at all. Pet.

App. 35a. Plainly, therefore, a taxpayer's refund claim requires careful factual examination.

Second, as this Court has repeatedly recognized, a taxpayer who has already recouped an unconstitutional tax (such as by passing the tax on to customers) has no constitutional right to sue for a windfall double recovery. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 350 (1937) ("[T]here is no denial of constitutional right in requiring the claimant to show, where it can be shown, that he alone has borne the burden of the invalid tax and has not shifted it to others."). Congress accordingly has directed claimants seeking a refund of excise tax to verify that they bore the burden of the tax or have the consent of the person who did. 26 U.S.C. 6416(a)(1); *Ranger Fuel Corp.* v. *United States*, 33 F. Supp. 2d 466, 468 (E.D. Va. 1998). That issue is suitable for examination and resolution during the administrative tax-refund proceeding. Cf. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 47 (1990) ("pass-on" analysis "entails a highly sophisticated theoretical and factual inquiry"). And a determination that the claimant has already recovered the allegedly unconstitutional tax avoids the need to resolve a constitutional question.

2. The tax-refund procedure provides full relief to *timely* claimants in respondents' position. Respondents themselves submitted timely refund claims with respect to tax years 1997 through 1999 and received full refunds and interest. In particular, claimants receive interest at a rate exceeding the federal short-term rate. 26 U.S.C. 6611(a), 6621(a)(1).

Respondents assert (Br. 32-33), for the first time, that the tax-refund remedy is inadequate because it does not provide for consequential damages and because the interest rate on refunds is too low. But respondents' own conduct confirms that those contentions are not credible. Respon-

dents have never sought any consequential damages, see Pet. App. 37a-38a, including for the period for which they received a refund. And they seek interest under the very statute that they claim is inadequate. See Resp. Br. 49-52; Resp. C.A. Br. 1-2. But in any event, this Court's unlawful-tax cases require no more than a fair chance to obtain a remedy that "prevent[s] any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40; see U.S. Br. 39-40. The refund procedure plainly satisfies that requirement.[3]

The tax-refund regime's broad applicability and full remedy conclusively refute respondents' accusation that the government adopted that regime as a means to hold onto—and profit from—illegally collected monies. The government does not reap the time value of the taxpayer's money; it pays that value to the taxpayer as interest.[4] That procedure is more than adequate to carry out what respondents insist is the Export Clause's prime goal: to prevent the federal government from drawing revenue from exports. Respondents' inability to obtain relief for tax years before 1997 is attributable, not to any deficiency in the refund procedure, but rather to their failure to assert their claims in a timely manner.

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[3] Nor is there any constitutional significance to the fact that interest is computed through a point shortly before the refund check is issued (Resp. Br. 33 n.23), a provision attributable to the simple fact that once the amount is computed, issuing a government check takes some little time. *De minimis non curat lex.*

[4] Indeed, if the government's position (in the refund proceedings or in court) is not substantially justified, the government may have to pay the taxpayer's attorney's fees and litigation costs. 26 U.S.C. 7430. The availability of interest and costs refutes respondents' notion that the government might tax exports simply as a way of borrowing money until it could be refunded.

3. The notion that the tax-refund procedure cannot validly redress Export Clause challenges, or constitutional claims more generally (Resp. Br. 33; NFIB Br. 11-13), is simply incorrect. The operative statute requires a refund or a credit *whenever* tax is overpaid. 26 U.S.C. 6402(a). That an unconstitutional tax statute remains on the books does not compel the IRS to continue enforcing it; the Executive Branch can, and does, decline to enforce statutes that it concludes are clearly unconstitutional. See U.S. Const. Art. II, § 3 (Take Care Clause); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199 (1994).[5] Accordingly, the IRS examines constitutional challenges to taxes as it does other legal arguments. See, *e.g.*, *IBM Corp.* v. *United States*, 31 Fed. Cl. 500, 502 (1994) (before litigating, IBM presented Export Clause argument to IRS, which extensively analyzed the issue on the merits and determined that the tax was constitutionally defensible), aff'd, 59 F.3d 1234 (Fed. Cir. 1995), aff'd, 517 U.S. 843 (1996). Indeed, the facts of this case confirm the efficacy of the refund mechanism for constitutional claims, because respondents' timely Export Clause claims were *successful* before the IRS. Without any repeal or other action by Congress, or even any holding of invalidity by an appellate court, the IRS determined that it would grant refunds of unconstitutionally assessed coal tax. I.R.S. Notice 2000-28, 2000-1 C.B. 1116.[6]

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[5] Congress has acknowledged as much, by requiring executive agencies to notify Congress when they decide not to defend the constitutionality of a federal statute "in any judicial, *administrative*, or other proceeding." 28 U.S.C. 530D(a)(1)(B)(ii) and (e) (Supp. V 2005) (emphasis added).

[6] The IRS was reviewing coal-tax refund claims in light of this Court's recent Export Clause decisions when the first plaintiff exer-

Furthermore, even if respondents were correct that the IRS would not have granted timely refund claims for the tax years at issue, there is no "futility" exception to the all-encompassing sweep of Section 7422. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272-273 (1931) (requiring compliance with refund-claim filing requirement notwithstanding lower court's finding "that the filing of a demand which was certain to be refused was a futile and unnecessary act"). As this Court has made clear, "[a]n anticipated rejection of the claim, which the [tax-refund] statute contemplates, is not a ground for suspending its operation," because "the condition upon which the consent to suit is given is defined by the words of the statute," and "it is not within the judicial province to read out of the statute the requirement of its words." *Id.* at 273.

D. The Constitutionality Of The Tax-Refund Procedure Is Not In Doubt

The mere fact that a plaintiff pleads a constitutional claim does not entitle him to sweep aside the procedural limitations that apply to an entire class of litigants, not just exporters. Yet that is precisely what respondents seek to accomplish here. They argue that Congress's decision to treat Export Clause challenges the same way it treats other constitutional and statutory challenges to taxes—permitting taxpayers to proceed in federal district court or the Court of Federal Claims only after payment, within a reasonable time, and subject to an administrative exhaustion procedure—is constitutionally dubious because Congress may not tax exports. That conflation of substance and procedure has no basis in the law.

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cised its right to proceed to court after the expiration of the statutory waiting period. *Ranger Fuel Corp.*, 33 F. Supp. 2d at 467-468.

1. Respondents necessarily concede (Br. 34) that even constitutional claims may become time-barred, and that they are bound *at least* by the Tucker Act's six-year outside limit, 28 U.S.C. 2501. Indeed, if they thought otherwise, they would have sued to recover nineteen years' worth of coal taxes (since 1978), not three. See Pet. App. 36a. And there is no meaningful constitutional distinction between a six-year time period in which to file suit and a three-year time period in which to file a refund claim, see 26 U.S.C. 6511(a). Cf. *Owens* v. *Okure*, 488 U.S. 235, 251 (1989) (applying three-year statute of limitations to constitutional claims under Section 1983); *Wilson* v. *Garcia*, 471 U.S. 261, 280 (1985) (same). Respondents cannot credibly assert that a three-year limitation period would "weaken or negate the strict prohibitions of the Export Clause." Br. 34-35. Respondents therefore can identify no constitutional doubt created by requiring their Export Claims to meet the tax-refund procedure's three-year deadline.

2. Their primary quarrel, therefore, is apparently with the refund procedure itself. But they offer no legitimate basis for their attack. Their policy objections to the refund procedure are unavailing, see pp. 7-12, *supra*, and if the requirement to file a refund claim is permissible, it follows *a fortiori* that the statutory requirement that a claimant allow the Commissioner time to review that claim before filing suit is also permissible. See 26 U.S.C. 6532(a)(1).

Nor is there any substance to respondents' argument (Br. 29, 34) that "tax-neutral" limitations on recovery are permissible but "tax-specific" limitations are not. Respondents offer no supporting authority, and there is none. The Internal Revenue Code's procedural limitations do not single out Export Clause claims for uniquely difficult treatment; they apply equally to *all* claims asserting a tax's invalidity, under the Constitution or otherwise. To the extent

neutrality is required, it is clear from nearly 150 years of history that the tax-refund procedure is "Export Clause-neutral."

At bottom, therefore, respondents appear to be objecting (at least in Export Clause cases) to the very notion of allowing the government to resolve constitutional challenges to taxes after collection. That objection is a curious one, because respondents never refused to pay the excise tax or sought to enjoin it. Had they sought injunctive relief, the government could have invoked the tax-injunction bar of 26 U.S.C. 7421, which might be thought a more appropriate target of respondents' constitutional objection. See pp. 15-17, *infra*. But, in reality, respondents concede that they suffered no irreparable injury warranting prospective relief, Br. 40 n.27, and the constitutional cause of action they are asking this Court to recognize is itself a post-payment remedy. Indeed, the relief they are seeking is *indistinguishable* from what they would have received through the tax-refund procedure, if only they had timely filed claims for the period in question.

3. In any event, respondents overlook the constitutional authority for the tax-refund procedure. Congress has power to determine the terms under which the United States will be subject to suit, and it has power to "lay and collect Taxes * * * and Excises," U.S. Const. Art. I, § 8, Cl. 1. To be sure, as respondents assert, Congress lacks the power to tax exports. But that fact alone does not mean that a taxpayer's mere invocation of the Export Clause must halt the collection of taxes while the constitutional claim is resolved—on that reasoning, any taxpayer with an Export Clause objection could unilaterally withhold payment of a tax or fee, even if his objection turns out not to be meritorious. The Export Clause has never been held to

require such unique treatment, and this Court should not so construe it now, for two reasons.

First, respondents fail to recognize that the tax-refund procedure is a conditional waiver of sovereign immunity. See *United States* v. *Dalm*, 494 U.S. 596, 608-609 (1990). The constitutional nature of the claim being asserted pursuant to that conditional waiver does not justify undoing the conditions, as the treatment of other constitutional claims illustrates. For example, the government lacks power to take private property for public use without paying just compensation. Yet a plaintiff who sues for the constitutionally required compensation must proceed according to the terms of the United States' waiver of immunity. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 753-754 (2008). Indeed, for nearly a hundred years until the Tucker Act was enacted, there was no general waiver of sovereign immunity, and Congress rather than the courts awarded compensation for takings. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). Similarly, a State's action against the United States pursuant to the constitutional equal-footing doctrine must proceed according to the jurisdictional limitations of the Quiet Title Act of 1972, including its time bar. *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286-287 (1983).

Second, even if the sovereign immunity of the United States were not at issue, this Court has repeatedly recognized that federal and state taxing authorities have an "exceedingly strong interest in financial stability," and for that reason "it is well established" that those taxing authorities "need not provide predeprivation process for the exaction of taxes." *McKesson*, 496 U.S. at 37. For those reasons, federal law requires some taxpayers (including excise taxpayers) to pay first, and bars them from seeking prospectively to enjoin the operation of any tax. 26 U.S.C. 7421.

"In this manner the United States is assured of prompt collection of its lawful revenue." *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (*Williams Packing*).[7] And as this Court has held, that requirement is perfectly legitimate, even as applied to a taxpayer who claims that the Constitution forbids the federal government from taxing him. "[A] suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it." *Dodge* v. *Osborn*, 240 U.S. 118, 121 (1916).[8]

Under those principles, the availability of the refund remedy is a complete answer to respondents' Export Clause objections. Had respondents refused to pay the coal tax and sued to enjoin its collection, they would have been directed to pay the tax and file a refund claim, and the constitutional nature of their objection would not have mattered in the slightest. Even the cases that respondents cite

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[7] If excise taxpayers refuse to pay the tax and as a result receive certain notices of levy or lien action, they may request a collection-review administrative hearing (with judicial-review rights), at which they may dispute the existence or amount of the underlying tax liability if they have had no prior opportunity to do so. See 26 U.S.C. 6320, 6330(c)(2)(B) and (d)(1).

[8] Respondents suggest (Br. 47, 49) that there is a distinction between taxes that are unconstitutional per se (such as a tax on exports) and taxes that are unconstitutional only if discriminatory. But this Court has upheld post-deprivation remedies even with respect to taxes that are altogether beyond the government's power. See, *e.g.*, *Dodge*, 240 U.S. at 119 (tax allegedly "void for repugnancy to the Constitution"). And in any event, taxes that are found unconstitutional because they are discriminatory may be invalidated—if, for example, the legislature cannot or will not cure the discrimination retroactively. See *McKesson*, 496 U.S. at 40-41; see also, *e.g.*, *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 637 (1895) (striking down income tax on rents from property under the Direct Tax Clause, before adoption of Sixteenth Amendment).

illustrate this point: *Williams Packing* reaffirmed that 26 U.S.C. 7421 limits taxpayers who cannot show irreparable injury (as respondents cannot, see Resp. Br. 40 n.27) to post-payment remedies. See 370 U.S. at 6-7.[9] And respondents' other key case, *Leedom* v. *Kyne*, 358 U.S. 184 (1958), permitted nonstatutory judicial review of the plaintiff's claim before agency proceedings were completed only because the plaintiff had "no other means" to "protect and enforce [its statutory] right." *Id.* at 190. What was "central to [the] decision in *Kyne* was the * * * [deprivation] of a meaningful and adequate means of vindicating its statutory rights"—not, as respondents claim, the agency's exceeding its authority. *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991). Because respondents had—but forwent—a "meaningful and adequate opportunity" to vindicate their own rights under the Export Clause, *Kyne* simply has no applicatio here. *Ibid.*

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[9] *Williams Packing* also held that even if a taxpayer *can* show irreparable injury, it still cannot seek prospective relief unless the government acted without "good faith" in assessing the tax. 370 U.S. at 7. "Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Ibid.* That was not the case in *Williams Packing*, and it is not the case here. The taxes at issue here were for 1994 through 1996. Pet. App. 9a. The proper interpretation of the Export Clause was sufficiently debatable to warrant this Court's attention in 1996 (when *IBM* was decided), as well as in 1998 (when *U.S. Shoe* was decided). But, of course, even if respondents could have satisfied *Williams Packing* had they tried to seek injunctive relief, that would not strengthen their case at this juncture. To the contrary, the possibility of obtaining injunctive relief in extraordinary cases is a further reason why respondents, after making no effort to pursue that avenue and paying their taxes, may not dismiss the entire tax-refund process as woefully inadequate simply by emphasizing that the prohibitions of the Export Clause are emphatic.

Thus, the Export Clause would not have given respondents any different remedy *before* payment. It follows, therefore, that *after* they paid the tax and stood in precisely the same position as any other eligible refund claimant, the Export Clause did not entitle them to a separate cause of action. Not only should Export Clause claims not be read *out* of the tax-refund remedy, the constitutional considerations discussed above explain why Congress would want to keep them firmly *within* the scope of that remedy. Indeed, in this context it appears that the *only* reason respondents can give for why they should be permitted to proceed on a freestanding Export Clause cause of action, as opposed to the refund remedy, is that they would not be time-barred under the former as they are under the latter. Respondents' failure to comply with well-established time limitations is no basis for fashioning out of whole cloth a novel and wholly unnecessary alternative remedy.

E. The Export Clause Does Not Create An Implied Private Right Of Action

The foregoing discussion establishes that respondents were required to proceed under the tax-refund statute before invoking the trial court's Tucker Act jurisdiction, because the refund procedure affords full relief for meritorious and timely constitutional claims and expressly bars all suits to recover tax overpayments not identified in timely refund claims. Thus, respondents' assertion (Br. 8-25) that this Court should recognize a hitherto-undiscovered implied right of action directly under the Export Clause is simply beside the point, because any such cause of action would be subject to the very procedural limitations that respondents seek to evade. Even if that were not the case, however, respondents have failed to show that the Export Clause should be read to create a freestanding constitutional cause of action.

1. Respondents' analysis of the intersection between the Export Clause and the Tucker Act is flawed in numerous respects, but it does include one correct statement: "Congress cannot change the meaning of the Constitution through legislation." Br. 21. Yet respondents are arguing in essence that the effect of the Export Clause is to be determined according to a body of law—"money-mandating" analysis—developed not under the Constitution, but under the Tucker Act. That argument lacks merit.

When a claimant sues the United States, it must identify a waiver of sovereign immunity *and* a cause of action giving it a right to recover money damages. See, *e.g.*, *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472-473 (2003). The Tucker Act provides the waiver of immunity (and the grant of federal jurisdiction), but it does not create a cause of action, which must instead arise from a source of substantive rights. *Id.* at 472. A statute creates a right enforceable under the Tucker Act if it "can fairly be interpreted as mandating compensation by the Federal Government." *Mitchell*, 463 U.S. at 217 (citations omitted). That money-mandating analysis is a method of interpreting federal statutes and regulations to determine whether Congress meant them to create substantive rights enforceable in a Tucker Act suit. *Bowen* v. *Massachusetts*, 487 U.S. 879, 906 n.42 (1988).

Money-mandating analysis does not remotely provide a sufficient basis for inferring causes of action directly under the Constitution itself. Unlike the statutes and regulations to which the courts apply money-mandating analysis, the Constitution was not written with the Tucker Act in mind. Only a very small number of constitutional provisions can be construed to create private causes of action of their own force. The remainder cannot, and Congress's later enact-

ment of the Tucker Act did not, and could not, change that reality.

Respondents object that the text of the Tucker Act does not distinguish between constitutional and statutory claims. But that is unsurprising, because in both cases the Tucker Act serves the same function—waiving sovereign immunity and granting jurisdiction to the courts in which the claim may proceed. In *neither* case does the Tucker Act provide a cause of action. *United States* v. *Testan*, 424 U.S. 392, 398 (1976). And it is in that respect—determining whether a cause of action exists—that constitutional and statutory provisions require different analysis.

Respondents also point to stray statements in this Court's Tucker Act decisions equating constitutional, statutory, and regulatory claims for purposes of the Tucker Act. But those decisions properly are read merely as quoting or paraphrasing the Tucker Act, without applying money-mandating analysis to every source of substantive rights including the Constitution. See, *e.g.*, *Mitchell*, 463 U.S. at 216. Indeed, this Court has never held that a provision of the Constitution confers an express or implied right of action against the United States based merely on a conclusion that a constitutional provision is "money-mandating." The Constitution was not at issue in *Testan*, the first case in the line; nor in the cases that *Testan* cited, see 424 U.S. at 400; nor in the cases that follow it, see, *e.g.*, *Mitchell*, 463 U.S. at 216-217. And *Testan* distinguished cases concerning an express right of action under the Takings Clause. See U.S. Br. 34-35.

The money-mandating analysis is particularly insufficient in the circumstances of this case. Congress has provided a statutory right of action—the tax-refund procedure—through which excise taxpayers may have their Export Clause claims fully vindicated. Perhaps Congress en-

acted that procedure because it perceived the Export Clause to be money-mandating in some sense. More likely, Congress found it appropriate to provide a remedy for all illegally assessed taxes. But whatever the reason for its creation, the fact of the remedy's existence makes any inquiry into the money-mandating nature of the Export Clause irrelevant. Because a monetary remedy for Export Clause violations *already* exists, there is no need to inquire whether such a remedy *must* exist, and no basis for inferring a *second*, enhanced constitutional remedy. This Court has been reluctant to find new *Bivens* remedies even for a plaintiff for whom "it is damages or nothing." U.S. Br. 36-37 (quoting *Davis* v. *Passman*, 442 U.S. 228, 245 (1979)). The hardship of a three-year statute of limitations is hardly a basis for inferring a cause of action here.

2. Nothing in this Court's Export Clause cases contradicts this analysis or endorses respondents' theory of a constitutional cause of action. In *IBM*, of course, the taxpayer filed a refund claim and sued under the tax-refund statute. See p. 11, *supra*. In *U.S. Shoe*, a special provision directed that the HMT be treated not as a tax, but as a "customs duty," so this Court harmonized that special provision with the Court of International Trade's jurisdiction over matters relating to "revenue from imports." 523 U.S. at 365-366 (citations omitted). The Court never discussed the source of U.S. Shoe's cause of action, which simply was not at issue (and has not been at issue in subsequent challenges to the HMT brought under the customs-protest statute). U.S. Br. 32 & n.10. The existence of a cause of action, this Court has often held, is not jurisdictional and may be assumed. See *Bell* v. *Hood*, 327 U.S. 678, 681-685 (1946) (deciding jurisdiction while assuming, but not resolving, the existence of a *Bivens* cause of action long before *Bivens* was decided). And nonjurisdictional assumptions of this sort are not pre-

cedential, let alone binding. See, *e.g.*, *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989).[10]

If this Court's Export Clause cases give any indication, they suggest that there is no freestanding constitutional cause of action. Respondents argue (Br. 42 n.30) that *United States* v. *New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906), is off point because the taxpayer pressed its Export Clause argument by bringing a statutory claim for a refund, not a freestanding constitutional claim. But on respondents' theory, *New York & Cuba Mail* would have been decided the opposite way had the taxpayer's complaint simply invoked the Export Clause rather than the refund statute. That suggestion is highly implausible; it is far more likely that no one thought of the Export Clause as giving rise to a constitutional cause of action when the Clause can so readily be enforced by means of the tax-refund remedy.

F. Respondents Can Recover Interest Only By Proceeding Under The Tax-Refund Statute

On respondents' view, the procedural limitations that apply to claims for overpayment of tax do not apply to freestanding claims under the Export Clause—but 28 U.S.C. 2411, the provision awarding interest on judgments for overpayment of tax, *does* apply because their "damages" claims, Pet. App. 37a-38a, are in fact claims for an "overpayment" of "internal revenue tax" within the meaning of

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[10] Nor did the Court address the question in its Compensation Clause cases, as respondents incorrectly suggest. The only jurisdictional question in *United States* v. *Will*, 449 U.S. 200 (1980), was whether federal judges' financial interest in the case affected jurisdiction. *Id.* at 211-212 (holding that it did not). The subsequent decision in *United States* v. *Hatter*, 532 U.S. 557 (2001), did not consider the Federal Circuit's jurisdictional ruling from nine years before, which at that point the government no longer contested.

Section 2411.[11] In combination, respondents' positions are untenable, because they contradict the statutory structure, history, and purpose.

Respondents contend that Section 2411 is a standalone provision, to be read in isolation and without reference to the tax-refund procedure, because the refund procedure was enacted long before. What respondents overlook is that for the first years of the tax-refund statute, no interest was available on refunds, but when Congress decided to make interest available, it enacted parallel provisions: one for interest on overpayment claims resolved by a refund, now 26 U.S.C. 6611, and one for interest on overpayment claims resolved by litigation, now Section 2411. See Revenue Act of 1921, ch. 136, § 1324(a) and (b), 42 Stat. 316. Those provisions are to be read *in pari materia*. Indeed, Congress has treated the two provisions as counterparts since their inception, simultaneously amending or re-enacting both of them on at least six separate occasions. See Gov't C.A. Br. 32 n.9. And when Congress re-codified the Judicial Code, but mistakenly left out the judgment-interest provision, it promptly corrected the error, with the legislative history of Section 2411 noting Congress's intent to restore "the provisions * * * of the former Judicial Code *for the payment of interest on tax refunds*." H.R. Rep. No. 352, 81st Cong., 1st Sess. 19 (1949) (emphasis added).

Section 6611 plainly requires the filing of a timely refund claim, because it provides for interest on "any overpayment" to be paid in conjunction with a credit or refund of that overpayment, see 26 U.S.C. 6611(b), and no credit or

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[11] Respondents seek "damages consisting of a refund," Pet. App. 37a-38a, but insist that other Export Clause plaintiffs should be permitted to seek consequential damages for Export Clause violations, Br. 32. Section 2411 is plainly limited to interest on "the amount of the overpayment," and does not contemplate interest on money damages.

refund can be allowed unless the taxpayer files a timely refund claim, see 26 U.S.C. 6511(b)(1), 6514(a)(1). Section 2411 must be given the same reading. As this Court has recognized, the judgment-interest statute is not meant to permit taxpayers to circumvent limitations in the refund-interest statute. See *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 757 (1961) (applying a limitation from the refund-interest statute to an award of interest on a judgment, to avoid the "anomalous, nonuniform and discriminatory result" and forum-shopping incentive that would result from treating the two parallel interest provisions divergently).

Respondents overread a superficial difference between Section 2411 and Section 7422(a), the provision of the integrated framework that precludes a taxpayer from filing suit at all "until a claim for refund or credit has been duly filed." Respondents claim (Br. 51) that Section 2411 is broader in scope than Section 7422(a) because the latter provision does not use the word "overpayment." But in reality, Section 7422(a)'s scope is broader than just the few words respondents quote, and respondents can identify no substantive difference between the two provisions.

The inescapable inference from the interconnectedness of the statutory framework is that Section 2411 grants interest only to taxpayers who have pursued a timely refund claim and, if the IRS had granted that claim, would have been eligible for interest under Section 6611. Respondents insist that they are proceeding outside the tax-refund procedure, and accordingly, if they may proceed at all, they must do so without the benefit of Section 2411.

As for respondents' claim (which was not advanced in their brief in opposition) that the Export Clause itself grants them interest (Br. 52-53), the Federal Circuit has correctly rejected that contention. See *United States Shoe Corp.* v. *United States*, 296 F.3d 1378, 1384-1386 (2002),

cert. denied, 538 U.S. 1056 (2003). Respondents' analogy to the Takings Clause, whose guarantee of "just compensation" has been construed to require the payment of interest, is unpersuasive. See *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 305-306 (1923) (relying on the term "compensation"). The Export Clause, unlike the Takings Clause, does not guarantee a substantive recovery; it prohibits Congress from taking certain action. Even if this Court were to find that prohibition enforceable through an implied private right of action, a refund would provide constitutionally adequate redress for a wrongly exacted tax. See, *e.g.*, *McKesson*, 496 U.S. at 51-52 (stating that "a refund of the excess taxes paid" would "satisf[y] the minimum federal requirements"); see also *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951) (per curiam) (referring to the Takings Clause as "[t]he only exception" to the rule that the United States is not liable for interest without Congress's express consent).

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed, and the case remanded to be dismissed for lack of jurisdiction.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CLINTWOOD ELKHORN MINING COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMICUS CURIAE BRIEF OF ALLIANCE COAL, LLC IN SUPPORT OF RESPONDENTS

Clifton S. Elgarten
Counsel of Record
William L. Anderson
Charles C. Hwang
CROWELL & MORING, LLC
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

Counsel for Amicus Curiae Alliance Coal, LLC

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

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AMICUS STATEMENT OF INTEREST

Amicus Alliance Coal, LLC operates subsidiaries who are plaintiffs in cases pending in the Court of Federal Claims that raise the same issues and whose outcome will likely be determined by this appeal. *Amicus* thus has a vested interest in the appeal and wishes to address certain legal issues, in particular why the tax refund statute procedures do not govern an independent right of action under the Export Clause and why the Government's assertion to the contrary is barred by this Court's line of cases rejecting any repeal of Tucker Act jurisdiction by statutory implication.[1]

SUMMARY OF ARGUMENT

Amicus files this brief to support the decision of the Federal Circuit Court. Respondents contend that they have two independent causes of action to recover the illegally collected taxes – one is through the tax refund statute provisions permitting recovery through the claims process administered by the IRS, and the second, alternative route is through the Export Clause pursuant to the Tucker Act's jurisdictional grant and procedural rules.[2] The

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1. Pursuant to Rule 37.6, *Amicus Curiae* certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus curiae made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

2 The Tucker Act itself does not provide any right to recovery, only the jurisdiction required to pursue a right identified elsewhere. *E.g.*, *United States v. Testan*, 463 U.S. 392 (1976); *United States v. Mitchell*, 463 U.S. 206 (1983).

Government contends that only the tax refund statute cause of action is available, and that even if the Export Clause provides an independent route of recovery, the procedures governing that route must be imposed by the tax refund statute. Those procedures would include not only the three-year statute of limitations, but also the requirement that the Respondents must have filed a claim for refund and pursued the administrative remedy before filing suit.[3] The Government relies heavily on the "no suit" and "any court" language in section 7422(a),[4] and on the canon of construction that the more specific provisions in the tax refund statute override the procedural requirements Congress had already provided in the Tucker Act. In essence, the Government contends that section 7422(a) has created a "black hole" that has swallowed the field of recovery of improperly collected taxes, in the process removing any such jurisdiction that otherwise would have vested not only in the Tucker Act's own broad language and procedural requirements but through any other right of recovery, "be it regulatory, statutory, or constitutional." Pet. Br. at 8.

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[3] Some coal producers, like Alliance Coal, pursued both routes out of an abundance of caution, and have obtained a refund under the tax refund statute for the years available but have not obtained any relief under the Tucker Act approach for the prior three years. Other producers pursued only the Tucker Act litigation and did not file any claim for refund, and thus presumably their entire recovery is dependant on the ruling in this appeal.

[4] 26 U.S.C. 7422(a) states: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... until a claim for refund or credit has been duly filed with the Secretary...."

Two panels of the Federal Circuit have disagreed with the Government,[5] and *Amicus* believes that court's opinions were correct. Given that the Export Clause provides a separate cause of action for recovery of illegally collected export taxes,[6] this case must be viewed through the lens of one of the most widely accepted doctrines in United States law, that plaintiff is permitted to choose its route to recovery and may plead independent theories, even if they overlap and would result in the same recovery. Ordinarily, the procedural rules that govern a cause of action are drawn from the substantive right to recover. A classic example is the statute of limitations – the limitations period for a contract action, for example, is drawn from the statutes or common law governing contract cases, and would never be imposed (or vice versa) on a negligence action, even if the relief sought (e.g., recovery of money) is exactly the same in both actions. Taxpayers who pursue a refund under the right granted by Congress in the tax refund statute without question would have to follow the procedures Congress imposed on that right of recovery – including the filing of a refund claim and a three-year limitations period. Given two

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[5] *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000); *Clintwood Elkhorn Mining Co. v. United States*, 473 F.3d 1373, 1374-75 (Fed. Cir. 2007).

[6] Respondents will brief the issue of whether the Export Clause provides an independent and self-executing right of action. Thus, *Amicus* will not address that issue here but will focus on the Government's primary position that the tax refund statute usurps the Tucker Act procedures and limitations period.

alternative routes of recovery, however, Respondents were not bound to the tax refund statute cause of action but were free to choose the Export Clause route. The procedures governing that cause of action – including the Tucker Act six-year limitations period – are those springing from the source of the right, i.e., the Export Clause.

If this is so, and *Amicus* asserts that this is the proper view of the case, then the Government is hard put to identify any reason why the procedures set forth in the tax refund statute should have anything to do with an action under the Export Clause. The Government relies heavily on the language of section 7422(a), but nothing in that provision suggests it is intended to cover causes of action that are not "actions to recover taxes" under the tax refund statute itself. The provision is limited by its terms to suits involving tax refund claims under the statute – and does not encompass contract actions, lawsuits based on other statutes, or constitutional claims for damages, as Respondents assert here. The language of section 7422(a) indicates only Congress' intent to apply the section 7422(a) ban to all lawsuits founded on *the tax refund statute itself* that do not proceed first through the claim for refund process.

Numerous opinions dating back one hundred years confirm that section 7422(a) and its predecessor section 3226 are limited by their terms to revenue act causes of actions. Since the early 1900s, taxpayers have asserted a substantive right to recover taxes other than the statutory right under the tax refund provision, based typically on a contract right, a separate statute, or the

Constitution.[7] In those instances, discussed in Section II, the taxpayer has *not been bound* by the requirement to file a claim, or by the Code's more narrow limitations period, and instead has utilized the Tucker Act's six-year limitations period over Government objections. In addition, these cases proceeded in the face of language identical to section 7422(a) dating back to 1875,[8] yet that language has not been held to foreclose tax-related lawsuits based on other causes of action. The Government accuses the Federal Circuit Court of "fashion[ing] an 'alternative' judicial remedy" calling on the longer Tucker Act limitations period (Pet. Br. at 7, 14), but in fact such alternative routes have existed for a long time. Thus, the Government's broad view of section 7422(a) is erroneous historically – taxpayers have long pursued other routes, some of which have been blessed by this Court.

Given this historical reality, the Government's position can only mean that the tax refund statute at

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[7] 28 U.S.C. 1491(a)(1) states in relevant part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States ...."

[8] Section 3226 of the 1875 act states: "No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of [*the*] Internal Revenue...." 1 Rev. Statute 622 (1875).

some point in time repealed the long-standing residual jurisdiction of the Tucker Act over contract, statute, and constitutional routes to a tax remedy.[9] This proposition cannot be true, either. A claimed repeal of Tucker Act jurisdiction by a statute that does not even mention the Tucker Act would fly in the face of a very strong and consistent line of Supreme Court authority (the *Regional Rail Cases)* under which a repeal of an existing statute cannot be implied from a subsequent statute unless Congress has expressed an "unambiguous intention" to effect a repeal. *See Preseault v. I.C.C.*, 494 U.S. 1, 12 (1990); *see also Regional Rail Reorganization Cases*, 419 U.S. 102 (1974). In five consecutive decisions, this Court has refused to eliminate or even cut back on existing Tucker Act jurisdiction in the face of argument that a separate Congressional statute repealed a portion of that grant.[10] These decisions reject the arguments presented by the Government here to support an implied repeal, namely reliance on plenary statutory terms such as "all" or "any, the complexity of the statutory scheme, or the need to protect the public fisc. Absent express intent from Congress to repeal the Tucker Act's residual tax

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[9] The implied repeal inferred by the Government is not minor or merely an administrative convenience – for some coal producers, including *Amicus*, it would cut their recovery period in half, and for others it would eliminate their claims entirely. The repeal suggested here cannot pass muster under the criteria used in the *Regional Rail* line of cases.

[10] *Preseault*, 494 U.S. 1; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Regional Rail*, 419 U.S. 102; *Amell v. United States*, 384 U.S. 158 (1966).

jurisdiction, the Government cannot be correct that section 7422(a) or any earlier provision of the revenue statute must be held to displace Tucker Act jurisdiction and procedures, including the six-year limitations period.

The Court does not need to abrogate the Tucker Act's tax jurisdiction, as the Government argues, in order to reconcile these two apparently colliding statutes. The tax refund statute procedures the Government asserts here would certainly govern any action brought under that act (i.e., all "actions for recovery of taxes"). In such a case, the Tucker Act substantive right is premised on the right to recover under that statute, which is the source of the waiver of sovereign immunity. This route encompasses the vast majority of tax refund actions. When the right to recover illegally collected taxes arises from a source *other than* the tax refund statute, however, the Tucker Act grants a cause of action and waives sovereign immunity for a direct claim against the Government, without recourse to the tax refund statute or its procedures. The number of claims that can be brought outside the tax refund statute is quite limited, but the Export Clause retains vitality as one of those sources, as this Court held in *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998). That is the path the Respondents and *Amicus* have taken.

Ultimately, the tax refund statute procedures urged by the Government here are not "more specific" provisions – they are *irrelevant* provisions. The coal producers are not bound by the tax refund statute claim for refund process or statute of

limitations because those provisions do not apply to a constitutional right to recover taxes through the Export Clause.

ARGUMENT

I. The Procedural Requirements Applicable to This Case Are Those Arising from the Source of Respondents' Right to Recover, the Export Clause.

The Government is wrong that this is a case about competing procedural provisions governing the same right, one of which is more specific than the other. The case is about two separate and independent grounds for recovery, each of which is governed by its own set of procedural requirements. The Government's most fundamental error is in its attempt to graft procedural requirements from one right of recovery, the tax refund statute, onto the Export Clause "count" or "cause of action" which Respondents have available to them. A plaintiff is entitled to select the cause of action and jurisdiction most favorable to its recovery and, if appropriate, even plead alternative causes of actions in the same case. *See* Fed. R. Civ. P. 8(a). As a corollary, the procedural restraints on a cause of action are those that are associated with the substantive right underlying that cause. This is the widely-acknowledged principle under which statutes of limitations operate – a statutory product liability cause of action limitations of two years, for instance, would never be imposed on a negligence cause of action whose statute is four years, merely on the ground that the product liability statute was more specific.

Christie-Street Comm'n Co. v. United States, 126 F. 991 (W.D. Mo. 1903), *aff'd*, 136 F. 326 (8th Cir. 1905), is an early application of this rule in the tax area that demonstrates why the Government's theory of the case is in error. The taxpayer pursued recovery of a tax refund under the claim procedure, but was untimely and tried to resort to the Tucker Act six-year limitation period. The taxpayer's only right to recovery, however, was the tax refund statute whose two-year statute of limitations was in the succeeding section of the code (section 3227). The court held that plaintiff could not utilize the Tucker Act limitations period *because* he had no other right of recovery: "[T]o maintain the action, the plaintiff must invoke some special enabling statute authorizing such suit. ... [Having chosen section 3226], the plaintiff must take the right thereby given, burdened with the conditions and limitations imposed." *Id.* The "general" versus "specific" argument applied in this analysis, but only because the more specific provision was *connected* to the right of recovery:

> It is, however, a well-settled rule of construction of such statutes, that such general provision does not conflict with a special limitation declared in *another statute, creating a particular cause of action* and prescribing the time within which it shall be brought.

Id. at 997 (emphasis added). The Government here is trying to accomplish the opposite – i.e., the Government is "borrowing" a specific statute from an unrelated cause of action to displace the applicable statute of limitations in another cause of action (the

Export Clause route). If this plaintiff could have asserted another cause of action – as Respondents do here under the Export Clause – his case would have proceeded under the six-year statute despite the presence of the more restrictive tax refund statute provision. The cases cited in Section II below also support this principle by refusing to apply tax revenue act procedures to rights of action from other sources. In addition, the primary cases relied on by the Government – *E.C. Term of Years Trust*, __ U.S. __, 127 S. Ct. 1763 (2007); *Hinck v. United States*, ___ U.S.___, 127 S. Ct. 2011 (2007); *United States v. A.S. Kreider & Co.*, 313 U.S. 443 (1941) – are only illustrations of other cases in which the cause of action asserted governed which procedures and limitations periods applied, as discussed in Section III. They do not support the Government's attempt to reverse the situation here.

The language of section 7422(a), despite its breadth, does not compel the Court to apply the tax refund statute's requirements to bar every other statutory, contract, and constitutional right to recover.[11] A number of courts, including this one, have recognized that when an action is brought under a substantive right to recover other than the tax refund statute, the action no longer falls under the language of section 7422(a) (or its predecessor section 3226) even if the taxpayer could have brought the action alternatively under the tax

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[11] *See* Pet. Br. at 8 ("Claims for repayment of unlawful tax are subject to the exclusive procedural requirements set out in the tax refund statute, no matter what the source of the alleged illegality – be it regulatory, statutory, or constitutional.").

statutes.[12] As a textual matter, it is both proper, and consistent with prior holdings of this and other courts, to construe the language of section 7422(a) to apply to actions brought under the tax refund statute, which are entirely and broadly foreclosed if the taxpayer does not file a claim for refund within three years.[13] Where a right exists outside of the tax refund statute, however, the procedures are governed by the source of the right, and nothing in the language of section 7422(a) declares Congress' unambiguous intent to make it otherwise. The Tucker Act and its procedural requirements, no less

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[12] *See, e.g., Daube v. United States*, 289 U.S. 367, 370 (1933) (tax recovery claim based "upon an account stated ... which gives rise to a new cause of action" was not constrained by the broad language of section 3226); *Bonwit Teller & Co. v. United States*, 283 U.S. 258, 265 (1931) (section 3226 did not apply to suit that was not pled under revenue statute but under contract theory to recover overpayment of taxes via certificate of overpayment in which IRS agreed to pay); *United States v. Hvoslef*, 237 U.S. 1, 10-11 (1915) (separate statutory cause of action did not require examination of "questions arising under the general provisions of the internal revenue act"); *Ray v. United States*, 453 F.2d 754, 758 (Ct. Cl. 1972) (case brought to recover taxes withheld on salary was "not a claim for refund of taxes" because it was brought under a different statute allowing recovery of "'pecuniary benefits' wrongly denied"); *Wm. J. Friday & Co. v. United States*, 61 F.2d 370, 370-72 (3d Cir. 1932) (refund process not applied to case for repayment of taxes brought under implied contract).

[13] Congress knew how to address Tucker Act issues in the tax statute when it chose to do so, as indicated by 26 U.S.C. 7422(f)(1), which specifically refers to 28 U.S.C. 2502 ("notwithstanding the provisions of section 2502 of title 28") in permitting actions against the United States. The Court should not imply that Congress intended part of the same code section (7422(a)) to abrogate all section 2501 tax jurisdiction when there is no mention of section 2501 anywhere in this provision.

enacted by Congress than the tax refund statute, are linked to Respondents right to recover (the Export Clause) and have been sufficiently "specific" to govern the prosecution of thousands of cases for more than a hundred years, including cases seeking "damages" or other relief for illegally collected taxes.

II. The Tucker Act Has Long Provided a Residual Tax Jurisdiction, Separate from the Tax Refund Statute, Based on Alternative Substantive Rights to Recover.

The Government's position in this case requires it to contend that the tax refund statute, presumably extending all the way back to the earliest ancestor of section 7422(a),[14] has forbidden taxpayers to recover taxes by any route other than the tax refund statute's procedural and administrative requirements. This position is not historically correct. There has always been a small but consistent stream of tax recovery cases presented directly in court through other laws; under theories of contract, implied contract, or "account stated;" or pursuant to constitutional causes of action. None of these actions depended on the tax refund statute for their viability or procedures. Given this line of cases, the Government is incorrect that the tax refund statute has occupied the entire field of tax recovery – it only occupies "recovery of taxes" causes of action based on the tax refund statute or otherwise where Congress has specifically declared that the Internal Revenue Code replaces Tucker Act jurisprudence.

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[14] The broad language of section 7422(a) existed as long ago as 1875. *See supra* n. 8.

A. Independent Tucker Act Tax Jurisdiction Developed in the Early 1900s and Became a Rule of Law by 1915.

Prior to 1915, tax law developed the procedures and jurisdictional rules under which taxpayers could pursue multiple routes to recovery based on separate causes of action. Before the Tucker Act was passed in 1887, the only route to recover a refund initially was a common law or statutory suit against the tax collector in an action of *assumpsit*.[15] Suits against the United States itself were not permitted because sovereign immunity had not yet been waived. A revenue law required that the payment of an illegal customs duty not be refunded unless paid under protest.[16] That statute played a role in the 1868 holding of this Court in *Nichols & Co. v. United States*, 74 U.S. 122 (1868), that an importer could not sue in federal court, even under alternate theories, without complying with the statute's protest requirement. *Id.* at 126, 130-31.

Nichols, however, preceded the Tucker Act. Over the first quarter-century of the Tucker Act's life, the broad *Nichols* rule became so distinguished and diminished that it clearly was no longer the law.

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[15] *See United States v. Kales*, 314 U.S. 186, 198 (1941); *United States v. Emery*, 237 U.S. 28 (1915); *Flora v. United States*, 357 U.S. 63, 66 (1958).

[16] Federal statutes included a "protest" requirement as early as 1845. *See* Act of Feb. 26, 1845, ch. 22, 5 Stat. 727. The earliest version of section 7422(a) may have been passed in 1866. Act of July 13, 1866, ch. 184 § 19, 14 Stat. 98, 152 ("no suit shall be maintained in any court for the recovery of any tax" without appeal to the commissioner).

As the Court of Federal Claims historians described it:

> After the Tucker Act, which did not change the language of the prior law relevant to this matter, there appeared exceptions to the sweeping ban of the *Nichols* case, though the view expressed there continued to be recognized as the general rule.... [discussing various exceptions]. It is not necessary in such a study as this to enumerate *all the instances where the Nichols dictum was avoided or ignored*.... Finally, in *Emery*, 237 U.S. 28 (1915), ... the *former exception became the rule.*

Cowen, W., et al., *The United States Court of Claims: A History*, pt. II, 39 (1978) at 43-44, reprinted in 216 Ct. Cl. (emphasis added).

During the pre-1915 era a number of taxpayers were permitted to proceed in district courts or Court of Claims without pursuing the administrative route first, and in some instances those actions were approved by this Court. For instance, in *United States v. Hvoslef*, 237 U.S. 1, 8-10 (1915), this Court accepted Tucker Act jurisdiction founded on a separate statute authorizing recovery of war taxes, in the process rejecting the Government's position that the only remedy was the approved revenue law route against the Collector. Likewise, in *South Carolina v. United States*, 199 U.S. 437, 438-40 (1905), the state was permitted to bring three causes of action on constitutional grounds over federal liquor taxes in the Court of

Claims without having pursued any protest or refund. The state lost on the merits but this Court did not question the right to proceed in federal court without pursuing revenue act remedy first. In *Dooley v. United States*, 182 U.S. 222 (1901), the Government claimed that the customs act (similar in scope to section 7422(a)) foreclosed all recovery outside the procedures therein. This Court in *Dooley* did not agree, in the process rejecting the very argument, in almost the very words, the Government is asserting here:

> [The *Nichols* case stated] that the [statute's] remedy [against the collector] was exclusive, and that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, did not intend to give the taxpayer and importer a *different and further remedy*. Subsequent statutes, however, have so far modified that special remedy ... and the broad statement in the *Nichols Case*, that revenue cases are not within the cognizance of the court of claims, if still true, must be accepted with material qualifications.
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> We think the case is one *within the first class of cases specified in the Tucker act*, of claims *founded upon a law of Congress*, namely a revenue law, in respect to which class of cases the jurisdiction of the court of claims, under the Tucker act, has been repeatedly sustained.

Id. at 225, 228 (emphasis added). A decade later, citing *Dooley*, the Seventh Circuit upheld jurisdiction over a challenge to a tax assessment brought directly in a district court in the face of a Government claim that the revenue law provisions provided the exclusive remedy:

> [T]he jurisdictional test must be whether the several provisions for recovery of internal taxes prescribe a remedy which is inconsistent with the general provision of the Tucker Act, and may thus operate to exclude other remedies (citations omitted). We believe no such inconsistent provision appears in the sections referred to, and that the rule upheld in *Dooley* ... and authorities cited in the opinion furnishes ample support for jurisdiction over the claim in suit.

United States v. Finch, 201 F. 95, 97 (7th Cir. 1912).[17]

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[17] These are by no means the only such cases. *See, e.g., Emery*, 237 U.S. at 31-32 (rejecting Government contention that only route for recovery was suit against collector based on "all laws" language in statute) and cases cited therein (recognizing dual causes of action and right to recovery outside of revenue statute); cases cited in *Dooley*, 182 U.S. 222 at 230; *United States v. New York & Cuba Mail*, 200 U.S. 488 (1906) (accepting jurisdiction but rejecting claim for lack of duress); *cf. Christie-Street Comm'n Co.*, 126 F. 991 (W.E. Mo. 1903), *aff'd*, 136 F. 326 (1905) (assuming jurisdiction would have been proper if taxpayer could have asserted recovery under a right other than revenue statute).

Thus, as early as 1915, this Court accepted the proposition that the Tucker Act granted the Court of Claims jurisdiction even in cases that appeared to be barred by the procedural requirement to file a claim, which was equally broad in scope as current section 7422(a).

B. Subsequent Case Law Has Continued to Recognize Tax-Related Causes of Action Other Than the Tax Refund Approach.

Subsequent to 1915, courts have continued to recognize a class of cases that can proceed directly to court under Tucker Act procedures and jurisdiction if the cause of action arises outside the tax statute. The grounds for those actions are those set forth in the Tucker Act, including the Constitution, laws of Congress, and express or implied contracts with the IRS that form a separate right to recover.

One set of such cases involved those in which the right of recovery is based on contract, express or implied – an alternative cause of action to the tax refund statute. An early example is *Wm. J. Friday & Co. v. United States*, 61 F.2d 370 (1932), in which appellant taxpayer sought recovery of overpaid income taxes but missed the two-year statute of limitations under the predecessor to 26 U.S.C. 6511(a). *Id. at* 370. Appellant brought suit in the district court under the Tucker Act without pursuing the revenue act's administrative procedures, and the Third Circuit Court upheld jurisdiction. The court held that the district court erred in failing to recognize that "plaintiff pleaded its claim in two forms" – one the tax refund claim, and the other

based on "the government's promise [and subsequent failure] to pay which is implied in a certificate of overpayment made and delivered by the Commissioner of Internal Revenue." *Id.* at 371 (quoting *Bonwit*). Similarly, in *Bonwit Teller & Co. v. United States*, 283 U.S. 258 (1931), this Court upheld jurisdiction in an overpayment of tax case, over the Government's protest that no claim for refund had been filed, based on the IRS's certificate of overpayment: "Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought." *Id.* at 265.

The Government itself cited the *Bonwit* ruling in *C. T. C. Inv. Co. v. United States*, 108 F.2d 383, 385 (7th Cir. 1939) in an attempt to defeat district court jurisdiction,[18] at the same time arguing that the claimant had not satisfied section 3226's protest requirement. The Seventh Circuit Court held that a corporation that overpaid its taxes, and then received assurances of payment, could indeed sue under contract in the Court of Claims (or under tort in the district court to recover an overpayment against a deceased Collector) and that the six-year Tucker Act statute of limitations applied. *Bonwit* at 265-66. Similarly, this Court in *Daube v. United States*, 289 U.S. 367 (1933), also recognized that a separate contract right of action, if properly supported, falls under the Tucker Act's six-year limitations period rather than the tax refund statute's shorter period. *Id.* at 370-73. The Court

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[18] The Government in *C.T.C.* tried to defeat district court jurisdiction by contending the case sounded in contract and thus fell outside the district court's $10,000 limit under the Tucker Act for contract claims.

entertained jurisdiction over a contract-based claim and reaffirmed the principle that "[a] specific limitation applicable to claims for the recovery of taxes is set aside and superseded whenever the statement of an account sustains the inference of an agreement that the tax shall be repaid."[19] *Id.* at 372-73.

It is also widely recognized in tax law that an "alternative theory for recovery" exists under the "account stated" doctrine, a common law theory based in implied contract. 15 *Mertens Law of Federal Income Taxation* § 58A:88 at 58A-194. "Where a taxpayer has failed to meet the two-year statute of limitations or other jurisdictional prerequisites required for a tax refund suit, a taxpayer may bring suit on an account stated on the basis that the government agreed to make a refund to the taxpayer." *Id.* at 58A-194 to 58A-195. Other parties seeking to recover unused portions of money deposited with the government to pay taxes are not required to file a claim for a refund, but can recover under the longer statute of limitations provided by 28 U.S.C. 2501 based on a "promise to pay" theory.[20] At least one court has permitted relief directly under the Tucker Act as a complete alternative to the tax

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[19] Plaintiff lost on the merits because "no definitive adjudication in favor of this taxpayer was ever made by the Commissioner or by other authority." *Id.*

[20] *See New York Life Ins. Co. v. United States*, 118 F.3d 1553, 1557-59 (Fed. Cir. 1997) (section 7422(a) does not apply to refund claim that was not a suit under the tax refund statute); *Schenley Imp. Corp. v. United States*, 121 F. Supp. 646 (Ct. Cl. 1953) (same).

refund statute, apparently without an independent right of recovery.[21]

Alternative statutes may also provide the basis for a recovery outside the confines of the tax refund statute. In *Ray v. United States*, 453 F.2d 754 (Ct. Cl. 1972), plaintiff sought to recover taxes improperly withheld from his retirement pay but chose to proceed under a separate benefits statute rather than the tax refund statute. *Id.* at 758. The Court of Claims held that "since plaintiff is not claiming under the Code, he need not preserve his claim according to its provisions," including by pursuing the code-requisite claims process. See also *Dooley*, 182 U.S. at 228; *Hvoslef*, 237 U.S. at 10-11; *Emery*, 237 U.S. at 31-32. The *Hatter* case brings the theory of alternative routes of recovery to the present and adds, along with *South Carolina* (state rights) and arguably *Dooley* (limits on president's war powers), a constitutional claim to the mix. *Hatter v. United States*, 953 F.2d 626, 628 (Fed. Cir. 1992). The judges in *Hatter* "could have pursued a tax refund"[22] to recover the social security taxes they claimed were unconstitutional, but they invoked Tucker Act jurisdiction instead based on the compensation clause of the Constitution. Section 7422(a) thus did not apply.[23]

Hatter (and *Cyprus Amax* before it) thus caps off a long line of cases allowing alternative recovery, under alternative rights to relief, without proceeding through the tax refund statute. This entire line of

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21 *Camp v. United States*, 44 F.2d 126 (4th Cir. 1930).

22 *Id.* at 629.

23 *Id.* at 628.

cases stands witness to the invalidity of the Government's primary contention here, that tax recovery claims are uniformly "subject to the exclusive procedural requirements set out in the tax refund statute, no matter what the source of the alleged illegality ...." Pet. Br. at 8.

III. The *Regional Railroad Reorganization Act* Line of Cases Requires More than an Implied Repeal of an Existing Statute's Provisions.

A. This Court Has Repeatedly Rejected Implied Repeals of Tucker Act Jurisdiction.

In light of the Tucker Act's historical tax jurisdiction outside of the tax refund statutes, the only remaining question is whether the provisions of the tax refund statute at some point in time repealed one hundred years of separate tax jurisdiction contained in the Tucker Act, including the right to recover directly under the Export Clause. The Government would presumably concede (assuming a self-executing Export Clause) that the Tucker Act is broad enough to allow Respondents' suit to go forward if the tax refund statute did not exist. Given that breadth of jurisdictional grant in the Tucker Act, the only rational way to characterize what the Government is contending is that section 7422(a) and the rest of the refund statute repealed a portion of Tucker Act jurisdiction and replaced it with the refund statute procedures.

Amicus believes this position is wrong, and in fact gets the equation exactly backwards. Under *Regional Rail*, the established principle that governs

this case is that implied repeals of existing statutes, or any part of them, are disfavored, and heavily so.[24] This rule is so dominant that five consecutive Supreme Court decisions have *rejected* any attempt to cut back on Tucker Act jurisdiction through an implied repeal by other statutes.

The most significant of this line of cases, because it is routinely cited in subsequent decisions, is the *Regional Rail* cases. In 1973, to address a national crisis caused by the filing of bankruptcy petitions by the nation's major railroads, Congress passed the Regional Rail Reorganization Act and established a Special Court to determine the distribution of railroad properties. Penn Central challenged the law as an unconstitutional taking, and the Government asserted that the Tucker Act provided an adequate compensation remedy, thereby foreclosing the takings claim. 419 U.S. at 109-21. The critical issue on appeal was whether the Rail Act preserved, or in the alternative eliminated, Tucker Act jurisdiction. *Id.* at 126. Based on the canon that implied appeals are heavily disfavored, the Court first corrected the District Court's misstatement of the question:

> The District Court made the wrong inquiry. The question is not whether the Rail Act expresses an affirmative showing of congressional intent to

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[24] Norman J. Singer, Sutherland Statutory Construction, Statutes and Statutory Construction Sixth Edition, Volume 2, pp. 461-66 (West Group 2001) ("The legislature is presumed to intend to achieve a consistent body of law. In accord with this principle subsequent legislation is not presumed to repeal existing law in the absence of expressed intent.").

> permit recourse to a Tucker Act remedy. Rather, it is *whether Congress has in the Rail Act withdrawn the Tucker Act grant of jurisdiction to the Court of Claims* to hear a suit involving the Rail Act founded ... upon the Constitution". ..."the true issue is *whether there is sufficient proof that Congress intended to prevent such recourse.*"

Id. at 126 (citation omitted) (emphasis added). To determine whether "the Rail Act withdrew the Tucker Act remedy that 'would otherwise exist'" (*quoting* the Special Court opinion), the Court looked, but could not find, any such conclusive evidence in the Act itself, in the legislative history, or in the Act's structure. Most critically, the act and history were completely silent (like the tax refund statute here) regarding the Tucker Act's concurrent jurisdiction. The Court concluded that "these provisions at least equally support the inference that Congress ... never focused upon the possible need for a suit in the Court of Claims." *Id.* at 128. "The most that can be said is that the Rail Act is ambiguous on the question. In that circumstance, applicable canons of statutory construction require us to conclude that the Rail Act is not to be read to withdraw the remedy under the Tucker Act." *Id.* at 133.

Equally critical was the importance of the original, broad Tucker Act jurisdiction: "'A new statute will not be read as wholly *or even partially* amending a prior one unless there exists a "positive repugnancy" between the provisions of the new and

those of the old that cannot be reconciled.'" *Id.* at 134 (*quoting* the Special Court opinion) (emphasis added). The danger of allowing a statute such as the Rail Act (or tax act here) to eviscerate the broad provisions of the Tucker Act by implication only is that it undermines Congress's presumed intent in enacting the original Court of Claims jurisdictional extent:

> Presumably Congress had given serious thought to the earlier statute [the Tucker Act], here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end... (*quoting* Special Court report).

Id. at 134. Thus, the Rail Act neither barred nor restricted Tucker Act jurisdiction.

Following *Regional Rail*, this Court has declined in three other cases to reduce Tucker Act jurisdiction in the face of complex statutes with plenary language like section 7422(a).[25] In *Duke*

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[25] The fifth Supreme Court case rejecting any implied repeal of Tucker Act jurisdiction preceded the *Regional Rail Cases*. *Amell v. United States*, 384 U.S. 158 (1966) (suits in Admiralty Act did not repeal Tucker Act jurisdiction over federal seamen compensation cases). *See also Morton v. C.R. Mancari*, 417 U.S. 535 (1974) (1972 Equal Opportunity Employment Act's proscription against race-based hiring did not impliedly repeal the 1934 Indian Reorganization Act's preference for Native American hiring).

Power, environmental groups alleged that the Price-Anderson Act's limitation of nuclear plant liability to $560 million constituted a taking. This Court disagreed on the ground that "on our reading the Price-Anderson Act does not withdraw the existing Tucker Act remedy." *Id.* at 94, n. 39 (*citing Regional Rail*). Six years later the Court issued one of the most important cases in this series, also one involving the Tucker Act, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). Monsanto claimed that the complex data disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) constituted a taking of its trade secrets, and that its right to compensation in the Court of Federal Claims was foreclosed because Congress in FIFRA had withdrawn Tucker Act jurisdiction over such a claim. The Court found, however, that FIFRA is silent on the interaction with the Tucker Act: "Nowhere in FIFRA or in its legislative history is there discussion of the interaction between FIFRA and the Tucker Act." *Id.* at 1017. Absent clear Congressional intent to repeal that portion of the Tucker Act, the Court rejected an implied repeal of the Tucker Act's broad jurisdictional grant:

> Since the Tucker Act grants what is now the Claims Court "jurisdiction to render judgment upon any claim against the United States founded ... upon the Constitution," we would have to infer a withdrawal of jurisdiction with respect to takings under FIFRA from the structure of the statute or from its legislative history. A withdrawal of jurisdiction would amount to a partial repeal of the Tucker

> Act. This Court has recognized, however, that repeals by implication are disfavored.

Id. at 1017-18 (*citing Regional Rail* and other cases).

Finally, in 1990 this Court in *Preseault* rejected a statutorily-implied repeal of the Tucker Act even though plaintiff argued, as the Government does here, that the repeal was necessary to protect the public fisc. Plaintiff landowners complained that the National Trails System Act ("Rails-to-Trails"), which permitted railroads to transfer unused rights-of-way to state or private groups to develop recreational trails, took away their reversionary easement interest and was thus an unconstitutional taking and an improper exercise of the Commerce Clause. This Court rejected the implied repeal for the same reasons as in earlier cases – the Rail Act with its legislative history "does not manifest the type of clear and unmistakable congressional intent necessary to withdraw Tucker Act coverage," *id.* at 14, and the public fisc (the stated intent to operate the rails-to-trails scheme at "low cost") did not support an implied repeal, *id.* at 16.

Several Circuit Court decisions are also on point, including *California v. United States*, 271 F.3d 1377 (Fed. Cir. 2001), in which the Federal Circuit held that the state of California could pursue a direct court claim, based on a contract right of action, against the government for flood damage claim reimbursement. The Government did not prevail in arguing that it was protected from contract liability by very broad language in the 1928 Flood Control Act immunizing the Government from

all flood liability ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place ...." (citing 33 U.S.C. 702(c) (1964)). *Id.* at 1381. The court refused to imply a withdrawal of the Tucker Act's contract jurisdiction despite the all-encompassing language in the Flood Control Act.[26] Accordingly, a repeal of Tucker Act jurisdiction cannot be implied by another statute's plenary language and "finely-reticulated scheme" when Congress has not directly addressed the concurrent Tucker Act role and withdrawn that jurisdiction.

B. The Tax Refund Provisions Do Not Repeal Any Portion of Tucker Act Jurisdiction Over Matters Arising Under a Different Substantive Right.

The analysis in the above line of cases demonstrates why there has been no repeal of the Tucker Act's residual tax jurisdiction, including separate Export Clause actions, by section 7422(a).

(1) *The complete absence of any express intent to repeal the Tucker Act forecloses any implied repeal by the tax statute.* Nothing in the tax refund statute on which the Government relies contains any

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[26] *See also Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316, 324-25 (8th Cir. 1989) ("Rails-to-Trails" act did not divest court of Tucker Act jurisdiction); *Gun South, Inc. v. Brady*, 877 F.2d 858, 868-69 (11th Cir. 1989) (Gun Control Act did not impliedly repeal gun manufacturer's Tucker Act right to compensation); *Zoltek Corp. v. United States*, 58 Fed. Cl. 688, 702-04 (Ct. Fed. Cl. 2003) (passage of act granting narrow patent jurisdiction to Tucker Act did not thereby impliedly repeal the remaining Tucker Act jurisdiction over patents).

reference whatsoever to the residual Tucker Act tax jurisprudence, much less any direct statement that Congress intended to eliminate one hundred years of independent claims court tax jurisdiction. Nor does the legislative history, at least that of the 1954 Internal Revenue Act which included section 7422(a), do so. In the one section of the House Report that addresses why the statute of limitations changed, the legislative history focuses on other, code-based four-year limitations periods and never mentions the Tucker Act six-year limitations period.[27] It appears Congress never thought about this aspect, possibly because the residual tax jurisdiction governs a relatively small number of tax recovery claims. The best that can be said is that this history is *ambiguous* and therefore cannot support an implied repeal of an existing statute. Congress has had multiple opportunities to state expressly that it so intended when the tax refund statutes were overhauled in 1913, 1939, 1954, and 1986 and when section 7422(a)(1)'s predecessors were amended or codified many times since 1875. All of these enactments occurred without any explicit abrogation of an ongoing set of Tucker Act tax cases that continued throughout this period (Section II above).

(2) *The plenary language in section 7422(a) is insufficient to support an implied repeal.* The

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[27] *See* Internal Revenue Code of 1954, Report of the Committee on Ways and Means, House of Representatives, H.R. 8300, House Report No. 1337, 83rd Congress, 2d Session (March 9, 1954) ("The 3-year period of limitations for assessment or refund now applying in the case of the income, estate and gift taxes is applied to excise taxes, which presently have a 4-year limitations period.").

Government rests its argument heavily on the broad language in section 7422(a): "No suit or proceeding shall be maintained in any court for the recovery of any internal tax ...." Section 7422(a) applies by its terms, however, only to actions under the refund statute for "recovery of taxes" and is not materially different in its breadth than language found in several of the acts held above not to imply a repeal of Tucker Act jurisdiction. FIFRA required that a data submitter who does not comply with statutory provisions "shall forfeit the right to compensation for use of the data ...." *Monsanto*, 467 U.S. at 1018. The Regional Rail Act required "consolidation before it of 'all judicial proceedings with respect to the final system plan." 419 U.S. at 127. The rails-to-trails act in *Preseault* provided that no payments could be made except through Congressional appropriations "notwithstanding any other provision of this Act," which plaintiffs claimed eliminated Claims Court litigation. 494 U.S. at 12. The broad "no liability of any kind for any flood" language of the Flood Control Act at issue in *California* is virtually on point with section 7422(a). *California*, 271 F.3d at 1381. Plenary language such as that in section 7422(a) is common in statutes but cannot by itself work a repeal of an earlier statute.

(3) *The "finely reticulated scheme" and public purpose of the tax act are not sufficient to imply a repeal.* Several of the statutes above, in particular the rail reorganization act in *Regional Rail*, the FIFRA data compensation scheme in *Monsanto*, and the rails-to-trails legislation in *Preseault*, involved complex schemes designed for important public purposes. As complex and important as the nation's tax refund scheme is, it is

difficult to distinguish this scheme from the acts at issue in the "no-repeal" line of cases. In none of the above cases did the Court imply that the outcome would have been different if the statute had been *more* complex, or *more* important for public purposes.

(4) *There is no "positive repugnancy" between the Tucker Act approach and the tax refund approach sufficient to imply repeal.* Although the two statutes appear to conflict, that was the case with every statute discussed in the above cases. The Court found no "positive repugnancy" between the acts because it could construe each statute to apply to separate circumstances.[28] That approach is equally preferable here, where the tax refund statute's procedures can be construed to apply to all matters arising under the tax refund statute, and the Tucker Act procedures are applicable to actions brought pursuant to other sources of a right of tax recovery.

C. The Cases Cited by the Government Do Not Compel the Conclusion that Tucker Act Jurisdiction Must Be Repealed in Favor of the Tax Statute.

The four cases primarily relied on by the Government – *New York & Cuba Mail S.S. Co*, *Hinck*, *Kreider*, and *E.C. Term of Years Trust* – do not support the Government's position in this case.

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[28] *See, e.g., Regional Rail*, 419 U.S. at 134; *Morton*, 417 U.S. at 550 (no implied repeal unless statutes are "irreconcilable"); *Monsanto*, 467 U.S. at 1018 (if statutes are "capable of coexistence" no repeal is implied).

Only *New York & Cuba* even deals with a circumstance in which a taxpayer asserted a right to recover independent of the tax refund statute, and that case turns on a common law doctrine lost to the dust of tax arcana since 1925. The cases instead stand for the same proposition asserted in this brief, that the procedural rules governing recovery arise from the source of the right of recovery.

For example, in *Kreider* the taxpayer availed himself of the tax statute's claims process to pursue a refund of income taxes, but then attempted to use the Tucker Act statute of limitations to extend his filing period. 313 U.S. at 446. The Court's rejection of that attempt was correct - *Kreider's* only source of a right to recover these taxes was the tax refund statute itself, and he was thus constrained to fit within its statute of limitations. He could no more "borrow" the Tucker Act limitations period than the Government can "borrow" the tax refund statute limitations period in this case and impose it on an Export Clause right of action.

This Court's *Hinck* decision is very similar. In *Hinck* the taxpayer sought to bypass a Tax Court appeal and go into federal court instead to claim an abatement of interest under tax refund statute section 6404(e)(1). The Court held that the taxpayer's only recourse was the Tax Court. *Id.* at 2015-17. For two reasons, *Hinck* fits well within the analysis described in this brief and does *not* fit the Government's theory of the case. First, Hinck's right to recover – the right to abate interest in section 6404 – was created by Congress in 1986, and Congress attached the procedural requirements to exercise that right (review in the Tax Court) to the

right itself. The Respondents' right of recovery, in contrast, arises not out of the tax refund statute but out of the Export Clause, which through the Tucker Act has its own set of rules. Second, before the enactment of section 6404(e)(1), the right to abate interest *did not exist* in statutes, the Constitution, or anywhere else. Against a blank page, Congress created a right and its concomitant remedies. *Hinck* could only apply here if the Export Clause were written out of the Constitution and Congress had never passed the Tucker Act. To the contrary, the Court's refusal in *Hinck* to find an implied repeal *is* fully applicable here, where there is likewise "no indication of any 'language on the statute books that [Congress] wishe[d] to change'" the Tucker Act in any way, including its statute of limitations. *Hinck*, 127 S. Ct. at 2016 (citing *United States v. Fausto*, 484 U.S. 439, 453 (1988)).

The primary holding of *New York & Cuba* was that the taxpayer was foreclosed from recovering an unconstitutional export tax because he paid the tax without being under duress. The "duress" doctrine is an archaic, common law tax rule that disappeared around 1925, but while it was in effect it infected every form of claim for taxes, including constitutional claims. *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 375-76 (1933); *see, e.g.*, *New York & Cuba*, 200 U.S. at 491-92. Thus, the "right to recover" asserted in *New York & Cuba* – the Export Clause and Tucker Act – were already restrained by the duress doctrine, and *not* through the revenue statute. The Court did not hold that revenue act procedures governed a constitutional claim. Further, five years before *New York & Cuba*, this Court had already held that the claims court had

jurisdiction over a tax-related action not based on the revenue code. *Dooley*, 182 U.S. at 222.

Finally, *E.C. Term of Years* provides nothing more than another example of a substantive right being governed by the procedures attached to that right. The taxpayer trust had its assets levied by the IRS and sought to challenge that levy. The substantive right to do so, and concomitant wavier of sovereign immunity, was contained in a specific tax refund statute provision, section 7426(a)(1), which "specifically authorized" an action to challenge a levy. *Id.* at 1765. Having missed the statute of limitations under 7426(a)(1), the trust tried, in vain, to resort to a longer statute of limitations under the general grant of jurisdiction to district courts over tax claims, 28 U.S.C. 1346(a)(1). As with the other cases the Government cites, the trust's *right to recover* – the right to challenge a levy – was contained in the code itself, not in any other statute or constitutional provision. Congress expressly imposed limits on that right of recovery, including a nine-month statute of limitations, but those limits do not apply to Respondents' Export Clause cause of action. In addition, the trust's reliance on section 1346 was doomed to fail because that provision creates jurisdiction, not a substantive right to recover. The Respondents here are not relying on the parallel provision, section 1491, for their *right* to recover, which comes from the Export Clause, but merely for court jurisdiction to hear that claim. The distinction is critical – if no source of a right to recover exists other than the refund statute, then refund statute provisions also govern the procedures available.

Nothing in these four cases can in any way justify the Government's contention that all Export Clause tax jurisprudence has been swallowed whole by the tax refund statute. Even less can they match up with the cohesive and highly consistent series of "no implied repeal" cases that compel the conclusion that the Export Clause right of recovery has *not* been repealed and is alive and well.

CONCLUSION

The Federal Circuit Court reached the correct decision. The procedures under the tax refund statute, including its more limited statute of limitations, are not applicable to a direct cause of action under the Export Clause. They arise from a separate route to recovery, and Congress has expressed no intention to replace Tucker Act jurisdiction over claims based on other substantive rights with the provisions in the tax refund statute. Respondents should prevail in this appeal.

Respectfully Submitted

Clifton S. Elgarten
Counsel of Record
William L. Anderson
Charles C. Hwang
CROWELL & MORING, LLC
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500
Counsel for Amicus Alliance Coal, LLC

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No. 07-308

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CLINTWOOD ELKHORN
MINING COMPANY, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF AMICUS CURIAE OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

KAREN R. HARNED
ELIZABETH MILITO
Of Counsel
National Federation of
Independent Business
Legal Foundation
1201 F Street, N.W.
Washington, D.C. 20004

ANTHONY T. CASO
Counsel of Record
Law Office of Anthony T. Caso
8001 Folsom Boulevard
Suite 100
Sacramento, California 95826
Telephone: (916) 386-4432
Facsimile: (916) 386-8952

Counsel for Amicus Curiae National Federation of Independent Business Legal Foundation

QUESTION PRESENTED

Whether a taxpayer's suit under the Tucker Act, 28 U.S.C. § 1491(a), seeking damages and interest for a violation of the Constitution's specific limitation on the power of Congress to impose a tax or duty on exports, is foreclosed by the Internal Revenue Code's tax refund scheme.

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INTEREST OF AMICUS CURIAE

Amicus, Nation Federation of Independent Business Legal Foundation[1] is the legal voice of small business in America. As the legal arm of NFIB, the Legal Foundation represents the interests of small business in the nation's courts. The Legal Foundation participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

The National Federation of Independent Business is an organization of more than 350,000 members in all 50 states. The members of NFIB are the small businesses that make up the backbone of the American economy. Small businesses account for more than 99% of all employers in the country and provide more than one-half of all jobs in our economy. More importantly, two-thirds of new job growth comes from small business. According to the United States Small Business Administration, small business accounts for more than half of the private nonfarm gross domestic product in America. United States Small Business Administration website,

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

FAQs: Frequently Asked Questions, *available at* http://app1.sba.gov/faqs/faqIndexAll.cfm?areaid=24 (last visited Feb. 17, 2008). In addition to providing goods and services in every sector of the economy (including exporting goods to other countries), NFIB members bear a significant portion of the overall national tax burden.

In pursuit of its goal to support small business in America, NFIB and the NFIB Legal Foundation have participated as amicus curiae in several cases before this Court including *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), *Rapanos v. United States*, 547 U.S. 715 (2006), *Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40 (2005), *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997), *Pierce v. Underwood*, 487 U.S. 552 (1988), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

This case is of special interest to small businesses that are often on the front lines of new taxing schemes. Small-business owners most often identify tax-related regulations as the most burdensome type of regulations with which they must comply. William J. Dennis, Jr., *Coping with Regulation*, NFIB National Small Business Poll, Vol. 1, Issue 5, 2001, at 4, *available at* http://www.411sbfacts.com/sbpoll.php?POLLID=0038&KT_back=1 (last visited Feb. 17, 2008). Because a complex and often unfair tax code and burdensome taxes are among the top concerns of small-business owners, NFIB is committed to securing tax relief and equity for its members.

These issues are at the forefront of this case where the government is urging a requirement that

taxpayers file constitutional challenges to Congressional enactments with an administrative agency that has no authority to rule on the challenge, and then wait six months for the agency to decide it has no authority to strike down an act of Congress before a legal action may be filed. The resources of small business are better spent growing the economy and creating new jobs.

SUMMARY OF ARGUMENT

The United States has already conceded that the tax at issue here violated the Export Clause of the Constitution. U.S. Const. art. I, § 9, cl. 5. The dispute now centers on the remedy for those injured by the unconstitutional enactment. More precisely, the question is whether Congress intended that challenges to constitutionality of federal laws be referred to an executive agency for resolution.

It may be that not every provision of the Constitution is "self-executing," and certainly few violations call for a damages remedy as a matter of constitutional text. Where the scope of the violation is expressed in the Constitution in concrete financial terms, however, this Court has ruled that the provision of the Constitution is self-executing. That is the case with the Export Clause. The clause is a specific limit on the power of Congress and is expressed in concrete financial terms. Thus, the Export Clause supports a cause of action for damages.

The United States urges that this action for damages for constitutional violations must be referred to an administrative agency. Yet, the statute on which the United States relies will not

support such a construction. There is no evidence that Congress intended that constitutional challenges to its authority be presented to the Secretary of the Treasury for resolution. It is certain that the Secretary has no authority to strike a Congressional enactment, and there is no evidence that Congress attempted to grant the Secretary such a judicial power.

With no other more specific Congressional enactment directly applicable, those who were damaged by the unconstitutional enactment are free to file their damage claims in the Claims Court under the Tucker Act. That act constitutes a waiver of sovereign immunity and provides the appropriate limitations period for filing damages actions based on the unconstitutional exaction.

ARGUMENT

I

THE EXPORT CLAUSE IS SELF-EXECUTING

A. The Export Clause Imposes a Clear Limit on the Power of the Federal Government

This Court has noted that the limitation imposed by the Export Clause is clear and direct. *United States v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 846 (1996). The clause is the result of a compromise struck between northern and southern states at the constitutional convention. Without this clear limit imposed on the scope of federal government power, the constitution may not have been possible. *See* The Avalon Project at Yale Law School website, *The Debates in the Federal Convention of 1787: Reported by James Madison:*

August 16, 1787, *available at* http://www.yale.edu/lawweb/avalon/debates/816.htm (last visited Feb. 17, 2008); *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 367-69 (1998); *Int'l Bus. Machines Corp.*, 517 U.S. at 859-60; *Fairbank v. United States*, 181 U.S. 283, 290 (1901). Although the United States has attempted to characterize this as a "narrow purpose" deserving of a narrow construction, *Fairbank*, 181 U.S. at 292, this Court has rejected such an approach. *Id.*

> As in *Fairbank*, we think the text of the constitutional provision provides a better decisional guide than that offered by the Government. The Government's policy argument–that the Framers intended the Export Clause to narrowly alleviate the fear of northern repression through taxation of southern exports by prohibiting only discriminatory taxes–cannot be squared with the broad language of the Clause. The better reading, that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all.

Int'l Bus. Machines Corp., 517 U.S. at 860-61. However narrow one might characterize the debate over this provision, "the remedial provision that ultimately became the Export Clause does not [have a narrow focus], and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language." *Id.* at 860.

The tax at issue in this case breaches this limitation on the power of Congress. The Coal Excise Tax (26 U.S.C. § 4121) imposed a tax on all coal–*including* coal that was exported to other countries. *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466, 468 (E.D. Va. 1998). While prior statutes levying similar excise taxes included a specific provision exempting products slated for export, this statute contained no such exemption. *Id.* In *Ranger Fuel*, the federal district court ruled the tax unconstitutional as a violation of the Export Clause. *Id.* at 469. The Internal Revenue Service acquiesced to the ruling. *See Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1103 n.1 (Fed. Cir. 2004).

It is conceded, therefore, that Congress had no power under the Constitution to impose this tax on coal slated for export. As explained below, this violation of the Export Clause supports a cause of action for damages.

B. Expressed in Concrete Financial Terms, the Export Clause Is Self-Executing

For the most part, the limitations on federal power under the Constitution are not expressed in financial terms. There is thus no intent expressed in the text of the Constitution that would support a claim for damages. A few provisions of the Constitution, however, do define the limit of federal power in financial terms. The text of the Constitution itself defines the nature of the injury in concrete financial terms and no further congressional action is required to define a damages remedy. A clear example of this is the Takings Clause of the Fifth Amendment.

The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause imposes a clear limitation on the reach of government power, prohibiting the uncompensated confiscation of private property. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981). In this context, "just compensation" is not stated as a "remedy" for the seizure of property. Instead, it is the necessary precondition for a lawful taking under the Constitution. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

Yet the "just compensation" language of the Fifth Amendment also serves to define the nature of the violation in concrete financial terms. When property is taken without payment or with less than adequate compensation, the Fifth Amendment dictates the measure of damages–just compensation. Under the Fifth Amendment, payment of just compensation is the necessary precondition for a constitutional taking. Thus, payment of just compensation is the minimum remedy called for in the Constitution for an uncompensated taking. *Id.* No action of Congress is necessary to define the scope of the damages to be awarded. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923).

This self-contained definition of the injury is what establishes the self-executing nature of the Takings Clause. As this Court has noted:

> But we need not have recourse to this natural equity, nor is it necessary to look through the constitution to the affirmations lying behind it in the

> Declaration of Independence, for in this fifth amendment there is stated the exact limitation on the power of the government to take private property for public uses.

Monongahela Navigation Co., 148 U.S. at 325. The constitutional command for "just" compensation also convinced this Court that the damages remedy must include the payment of interest from the date of the taking. *Seaboard Air Line Ry. Co.*, 261 U.S. at 304.

This Court has not treated this as a matter in dispute. Instead, it is a simple and noncontroversial application of the limitation of government power imposed by the Constitution. "Having taken the lands of the defendants in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property." *United States v. Rogers*, 255 U.S. 163, 169 (1921). The Court's decision in *Jacobs v. United States*, 290 U.S. 13 (1933), provides a clear statement of the principle:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. *Statutory recognition*

> *was not necessary.* A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.

Id. at 16 (emphasis added). This recognition that the Takings Clause of the Fifth Amendment supported a free-standing damages remedy was repeated in *United States v. Clarke*, 445 U.S. 253, 257 (1980) (citation omitted) ("A landowner is entitled to bring such an action as a result of 'the self-executing character of the constitutional provision with respect to compensation.'") and *San Diego Gas & Elec. Co.*, 450 U.S. at 654.

These same principles were at work in *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992) in a claim regarding judicial pay. The court in *Hatter* considered a claim that the Social Security Amendments of 1983 violated Article III, section 1 of the Constitution providing that judges' compensation "shall not be diminished during their continuance in office." *Id.* at 628. The challenged enactment extended social security coverage (and tax assessments) to federal judges, effectively reducing the compensation that the judges received. *Id.* at 627. As in this case, the judges brought their action under the Tucker Act seeking damages for violation of their rights under this provision of the constitution. *Id.* at 627-28. The United States sought dismissal of the case since the judges did not submit an administrative claim for refund under 26 U.S.C. § 7422.

The court of appeals rejected the argument that the judges were required to file administrative claims for tax refunds. The court noted that Article III, section 1 "of the Constitution, fairly interpreted, mandates the payment of money in the event of a prohibited compensation diminution. . . . This language presupposes damages as the remedy for a governmental act violating the compensation clause." *Hatter*, 953 F.2d at 628.

As was the case with the Takings Clause, the court noted that this provision of the Constitution was stated in concrete financial terms–no further definition of the remedy is required by Congress. "[T]he Constitution itself provides a remedy–compensation. In sum, by forbidding any diminution of judicial compensation, the Constitution itself requires repayment of prohibited reductions in compensation to Article III judicial officers." *Id.* at 628. The court concluded that both the purpose and text of Article III, section 1 "embraces a self-executing compensatory remedy." *Id.* at 629.

The same is true for the Export Clause. The very precision of this limitation on the scope of Congressional power defines the minimum necessary damages remedy–return of the "tax or duty" that was levied on the export. Requiring further legislative or executive action would frustrate the purpose of the Export Clause. *See id.* at 628-29. As with the Takings Clause and the Judicial Compensation Clause, the Constitution itself defines the remedy. Because the remedy is defined in the Constitution (just compensation for a taking, restoration of salary for a diminution of judicial compensation; or return of a tax or duty levied on exports), the provision of

the Constitution is "self-executing" and supports an action for those damages without any further action of Congress.

II

THE TAX REFUND ADMINISTRATIVE PROCEDURE IN SECTION 7422 WAS NOT INTENDED FOR CONSTITUTIONAL CHALLENGES TO CONGRESSIONAL ENACTMENTS

The brief for the United States notes that Congress has set out a "detailed and finely reticulated refund scheme, *including the mandatory administrative claims process*" for challenges to the application of the Tax Code. Brief for the United States at 8 (emphasis added). This is undoubtedly an accurate assessment of the administrative remedy provided for under 26 U.S.C. § 7422. However, the United States misses the import of having such a "finely reticulated" procedure. Whenever a detailed procedure is present in the statute, that very detail provides the Court with its best clue as to legislative intent. *See Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct 1994, 1996 (2007).

In the case of Section 7422, Congress required an administrative claim for refund to first be filed with the Secretary of the Treasury. Under this scheme, no judicial action for remedy may be filed until the Secretary has had at least six months on which to act on the administrative petition. 26 U.S.C. § 6532. This detailed procedure is obviously applicable to allegations that the Secretary has erred–either as a matter of fact or statutory interpretation–in the application of the Tax Code to

an individual taxpayer. *See Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 564 (6th Cir. 2007). Courts have consistently held that the intent behind this procedure is for claims to be resolved short of litigation. *See IA 80 Group, Inc. & Subsidiaries v. United States*, 347 F.3d 1067, 1074 (8th Cir. 2003); *Mallette Bros. Constr. Co., Inc. v. United States*, 695 F.2d 145, 155 (5th Cir. 1983); *Union Pac. R.R. Co. v. United States*, 389 F.2d 437, 442 (Ct. Cl. 1968). The United States argues in this case, however, that this procedure was also intended for challenges to the constitutionality of a Congressional enactment.

The brief of the United States offers no evidence of a legislative intent that constitutional challenges were to be referred to the Secretary of the Treasury. Adjudicating the constitutionality of an Act of Congress is, of course, a judicial function. Congress could not assign that power to the executive. *See United States v. Booker*, 543 U.S. 220, 243 (2005).

Given that it is unlikely that Congress intended to grant the Secretary of the Treasury the power to rule on the constitutionality of an Act of Congress, the application of Section 7422 to this proceeding becomes even more problematic. As noted, the statute requires the initial claim to be filed with the Secretary. 26 U.S.C. § 7422. No judicial action may be filed until six months have elapsed after this filing. 26 U.S.C. § 6532. There is no purpose served to presenting an administrative petition for refund based on a constitutional challenge to the statute. Nor can there be any legitimate purpose behind a six-month moratorium on judicial review of that constitutional challenge.

The United States notes that Congress is free to impose whatever administrative procedures it desires as a condition to the waiver of sovereign immunity. Brief of the United States at 28. However, there is no evidence to suggest that Congress intended to impose pointless procedural hurdles to claims such as that before the Court in this action. The procedural "hoops" to filing a constitutional challenge advocated by the United States in this case would only serve to make a challenge more costly and to ensure that it would take longer to resolve. Before this Court embarks on an analysis to determine if Congress has the authority to impose barriers to constitutional claims, the Court should first determine if Congress actually intended to require such apparently pointless hurdles to a constitutional claim.

The finely wrought and detailed administrative procedure for challenging an action of the Internal Revenue Service simply has no place in the resolution of constitutional challenges to congressional enactments.

III

THE TUCKER ACT'S WAIVER OF SOVEREIGN IMMUNITY AND SIX-YEAR STATUTE OF LIMITATIONS APPLY TO CLAIMS FOR DAMAGES FOR VIOLATION OF THE EXPORT CLAUSE

The Tucker Act recognizes jurisdiction in the Claims Court to hear damages claims against the United States based on the Constitution. 28 U.S.C. § 1491. The Act does not establish a cause of action, *United States v. Mitchell*, 445 U.S. 535, 538 (1980),

but does operate as a waiver of sovereign immunity, *United States v. Mitchell*, 463 U.S. 206, 215 (1983).

In *Hatter*, the Federal Circuit held that the Tucker Act provided jurisdiction for the Claims Court to hear a claim for damages based on a self-executing provision of the Constitution. *Hatter*, 953 F.2d at 627-28. According to that decision, for a claimant to invoke the court's jurisdiction under the Tucker Act, it must demonstrate "an independent source of federal law" for the claim and must further demonstrate that the particular federal law "provide[s] a damages remedy for violations." *Id.* at 628. This was satisfied in *Hatter* by the reference to Article III, section 1–the Judicial Compensation Clause.

The court in *Hatter* reasoned that the Compensation Clause provided its own remedy. "By forbidding any diminution of judicial compensation, the Constitution itself requires repayment of prohibited reductions in compensation to Article III judicial officers." *Id.* Thus, the court ruled that the judicial officers in *Hatter* could bring their claim in the Claims Court pursuant to the Tucker Act.

This same reasoning applies in this case. As demonstrated above, the Export Clause also provides its own remedy. Because it is a clearly stated limitation on the power of Congress framed in financial terms, the clause is "self-executing." It thus fulfills the requirement for a claim "founded . . . upon the Constitution." 28 U.S.C. § 1491. The provision of the Constitution, fairly interpreted, establishes "a damages remedy for violations." *See Hatter*, 953 F.2d at 628. This action was, therefore, properly before the Claims Court.

The United States expresses concern, however, that this will lead to the filing of *every* constitutional challenge to a tax under the Tucker Act. Brief for the United States at 28. This parade of horribles, however, will not result from the analysis urged by Respondent. The First Amendment claims feared by the United States are based on a textual command that "Congress shall make no law". U.S. Const. amend. I. That text does not demonstrate any intent that there is a damages remedy for a breach of the limit on Congressional power. By contrast, the Export Clause forbids the imposition of a "tax or duty" on exports. Because of the nature of the limit on the power of Congress, the measure is defined in financial terms. The obvious remedy for the imposition of a tax forbidden by the Constitution is monetary damages. Such a remedy makes the citizen whole and fulfills the purpose of the Constitution. Because the Export Clause is self-executing and contemplates an award of damages (return of the unconstitutional tax collection), the Tucker Act supplies the necessary jurisdiction for the Claims Court to hear this case.

CONCLUSION

The judgment of the Court of Appeals for the Federal Circuit should be affirmed.

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Respectfully submitted,

KAREN R. HARNED
ELIZABETH MILITO
Of Counsel
National Federation of
Independent Business
Legal Foundation
1201 F Street, N.W.
Washington, D.C. 20004

ANTHONY T. CASO
Counsel of Record
Law Office of Anthony T. Caso
8001 Folsom Boulevard
Suite 100
Sacramento, California 95826
Telephone: (916) 386-4432
Facsimile: (916) 386-8952

Counsel for Amicus Curiae National Federation of Independent Business Legal Foundation